87-1114

No. 87-

In the

Supreme Court of the United States

OCTOBER TERM, 1987

C. PETER WHITMER,
Petitioner,

v.

THE STATE BAR OF ARIZONA

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

RALPH OGDEN
Attorney for the Petitioner

WILCOX & OGDEN
910 CHANCERY BUILDING
1120 LINCOLN STREET
DENVER, COLORADO 80203
303-861-5501

JANUARY 2, 1988

QUESTIONS PRESENTED FOR REVIEW

1. Whether the existence of an attorney-client relationship between the prosecuting attorneys and the hearing judges in an attorney disciplinary proceeding, with the prosecutors as attorneys and the hearing judges as clients, is a *per se* violation of the Due Process Clause either because the relationship makes it impossible for the hearing judges to be neutral and detached or because it impermissibly merges the prosecutorial and adjudicatory functions.

2. Whether the Due Process Clause tolerates an attorney disciplinary proceeding in which the hearing judges sign the complaint, appoint the prosecutors, confer with them after the initial charges are filed on an *ex parte* basis about adding, dropping and amending charges, about further investigations and about the evidence likely to be produced by both sides and then refuse to disclose what was discussed at the *ex parte* meetings by claiming that they are protected by the attorney-client privilege.

3. Whether a *de novo* review by a state supreme court, based solely upon a transcript of the evidence given before hearing judges, can cure a Due Process infirmity resulting from an impermissible bias by the hearing judges towards the prosecution, or whether the Due Process Clause requires that in every case the person before whom the evidence is given be neutral and detached.

Stephen M. Zang, who was petitioner's law partner throughout the proceedings below, was a co-respondent with petitioner in the disciplinary proceedings at issue here. He is not, however, a party to this petition.

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C. Peter Whitmer respectfully petitions the Court to issue a writ of certiorari to review the judgment and opinion of the Supreme Court of Arizona, issued on July 8, 1987.

OPINIONS BELOW

The opinion of the Supreme Court of Arizona is reported at 741 P.2d 267 and is set out in Appendix A at pages 1-40. The court's order denying rehearing and its mandate of the same date appear in Appendices D and E, at pages 131 and 133, respectively.

The opinion of the Disciplinary Commission of the Arizona Supreme Court is unreported. It was entered on February 4, 1986, and appears in Appendix B at pages 41-90.

The opinion of Special Local Administrative Committee S-25, before which the evidence in this case was taken, is likewise unreported. It was issued on October 24, 1984, and is set out in Appendix C at pages 91-130.

JURISDICTION

The judgment and opinion of the Supreme Court of Arizona were issued on July 8, 1987. On September 16, 1987, that Court denied a timely petition for rehearing and issued its mandate.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1247(3). This petition is timely filed pursuant to an order of Justice Sandra Day O'Conner, granting an enlargement of time under Supreme Court Rule 29.2, up to and including January 2, 1988.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

The Fourteenth Amendment to the United States Constitution states, in pertinent part:

> . . . Nor shall any State deprive any person of life, liberty or property, without due process of law. . . .

The applicable rules of the Supreme Court of Arizona are set out in Appendix F, at the back of this petition.

STATEMENT OF THE CASE

In early 1982, the Arizona Supreme Court's Disciplinary Commission appointed Special Administrative Committee S-25, whose sole function was to investigate allegations of unethical conduct against the petitioner and his law partner.

The special committee was created after—and presumably in response to—the regular administrative committee's failure to file charges after investigating petitioner's advertising practices.

Under the rules then in effect, the special committee was responsible for investigating the charges, determining whether there was probable cause to file a formal complaint, preparing the complaint, appointing the prosecutors and then sitting as the triers of fact. *See,* Former Rules of the Arizona Supreme Court, Appendix F.[1]

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[1]Although these rules were repealed in 1984, they governed all proceedings in the case at bar. 741 P.2d 268, n.1; Appendix A, n.1, page 37.

Custom and practice within the State Bar required an administrative committee to notify the attorney being investigated and allow him to present evidence of his innocence. This was to be done *before* the Committee made a probable cause determination. The Special Committee in the case at bar ignored this requirement. It filed and thrice amended the initial complaint without ever asking petitioner for his view of the contemplated charges.

The Committee was also empowered to investigate on its own; i.e., to look for unethical conduct even in the absence of a complaint from someone. As set forth below, this power was used on several occasions.

To assist them with "the investigation and presentation of evidence," the Committee appointed three Phoenix attorneys to act as Bar Counsel. See Rule 33(b)(2), Appendix F. This rule states that "the general function of bar counsel . . . shall be to present all the material facts to the appropriate committee. . . . Their function is not that of a prosecutor."

Bar counsel were, however, prosecutors in fact if not in name. They took contested depositions, issued subpoenas, made discovery demands, resisted discovery and other requests made by the petitioner, opposed motions to dismiss, moved to amend the complaint, opposed petitioner at motions hearings, presented evidence of the charges at trial, and prepared briefs opposing the petitioner's position before the Committee, the Disciplinary Commission, and the Arizona Supreme Court.

The Committee met on an informal *ex parte* basis with bar counsel to consider the charges and the evidence to support them and to determine whether probable cause existed to file charges. *See*, Former Rule 33(b)(2). On December 15, 1982, the Committee filed a ten count complaint. Because the Committee's probable cause discussions with bar counsel were oral and unreported, the record contains no indication of the basis upon which probable cause was found.

Petitioner retained counsel and promptly moved to dismiss for lack of probable cause and because the complaint failed to provide adequate notice of the charges. This motion was denied.

Bar counsel and the Committee used their subpoena power

to continue their investigations long after the original complaint was filed. These investigations resulted in a First Amended Complaint being filed on July 5, 1983. One Count was added, two were dropped, and material changes were made in all but one of the remaining eight.

The Due Process issues raised in this Petition surfaced a few days after the First Amended Complaint was filed. Petitioner learned informally that bar counsel had had several *ex parte* meetings with the Committee. When petitioner asked bar counsel to explain, bar counsel demurred, saying that the conversations were protected from disclosure by both the attorney-client and the attorney work-product privilege.

On July 8th, petitioner moved to disqualify the Committee on the ground that these conversations, among other things, were evidence of an unconstitutional merger of the prosecutorial and adjudicative functions.

Petitioner argued that this merger—and in particular the attorney-client relationship between the judges and those who prosecuted him—prevented him from receiving a fair trial before neutral and detached fact-finders.

Bar counsel's reply included an affidavit by Edwin F. Hendricks, Esq., who stated that

> I was appointed lead Bar Counsel to Special Administrative Committee S-25 of the State Bar of Arizona (the "Committee") in September of 1982. . . .
>
> 2. Since my appointment as Bar Counsel, I have regarded communications and meetings between Bar Counsel and the Committee as protected by the attorney-client and work-product privileges. Without waiving either of those privileges, I will set forth the general topics of discussion at certain meetings between Bar Counsel and the Committee.

Mr. Hendricks went on to allege that only procedural matters of no special import had been discussed at these *ex parte* meetings. Neither of the associate bar counsel and none of the three Committee members filed an affidavit on this issue.

Before the motion to disqualify was ruled upon, petitioner took Mr. Hendricks' deposition. Mr. Hendricks acknowledged that no record was ever made of the meetings between the committee and

bar counsel, and that their communications were all "oral." He again asserted the attorney-client and work-product privileges to avoid disclosing the contents of the *ex parte* communications. Petitioner then moved the Committee to order the disclosure.

Without comment, the Committee denied the motion to disqualify on September 15, 1983. As to the motion to compel, the Committee stated:

> 11. As to Respondents' oral objection as to the refusal of Mr. Edwin F. Hendricks to disclose statements at his deposition or the content of a meeting held on July 5, 1983, by Bar Counsel and State Bar Special Administrative Committee S-25, to wit: Mr. James M. Marlar and Mr. Jeremy Toles with Mr. Dennis I. Wilenchik absent, and the argument that there may be a waiver of the attorney/client privilege, it is ordered denying Respondents' objection and holding there has been no waiver of the attorney/client privilege between Bar Counsel and the State Bar Special Administrative Committee.

This ruling acknowledged the Committee's attorney-client relationship with bar counsel.

Bar counsel and the Committee continued their investigations and in November of 1983, filed a Second Amended Complaint. Counts five, six and seven were materially amended and a new count ten was added.

An evidentiary hearing was held from January 23-27, 1984. On January 25th, bar counsel again moved to amend the complaint. The amendment was alleged to be necessary because of evidence "to be introduced at the hearing" which would show an additional ethical violation.

The third amended complaint was signed by the Committee chairman on March 21, 1984. It added as count eleven the two separate allegations of misconduct referenced in the January 25th motion.[2] Further evidence was taken on March 21-24.

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[2]The Arizona Supreme Court dismissed these additional charges as they applied to the petitioner, and hence the impropriety of taking evidence before formal charges were filed is not at issue in this petition. Cf. *In Re Ruffalo*, 390 U.S. 544 (1968).

The Due Process issues were unsuccessfully reiterated to the Committee once the evidence was closed. They were also raised on appeal to the Disciplinary Commission. See, Commission Decision, Appendix B at page 56. The Commission noted that "Apparently bar counsel also met with the Committee as its legal adviser on the motions to disqualify," but did not otherwise discuss the *ex parte* communications. Appendix B, at page 57.

The Commission concluded that the merger of prosecutorial and adjudicative functions was constitutionally acceptable under *Withrow v. Larkin*, 421 U.S. 35 (1975) and summarily rejected Petitioner's Due Process challenge.

After oral argument in the Arizona Supreme Court, however, the Court remanded for discovery on the content of the *ex parte* communications.

Bar counsel produced a "confidential" letter dated July 3rd from Mr. Hendricks to Committee Chairman Toles. (Appendix G) Mr. Hendricks asked the committee to "issue an order giving the respondents and their counsel a deadline for responding to our long-standing discovery requests." He then set forth a discovery schedule and proposed an agenda for a meeting to discuss and clarify the existing charges.

Associate bar counsel David Campbell answered Petitioner's interrogatories about the July 5, 1983, *ex parte* meeting between all three bar counsel and the Committee. (Appendix H) It was held at the Phoenix Country Club Men's Grill. Bar counsel and the Committee went through each charge in the complaint—which petitioner had already moved to dismiss—and deleted charges they thought would not be successful, altered others, and allowed some to stand. There was a detailed discussion of the evidence pertaining to the charges, after which bar counsel recommended that a new charge be added. Following this meeting, the Committee retired to another room of the Country Club and voted to accept all of the recommendations it had received *ex parte* from bar counsel. The First Amended Complaint was filed later that day.

The Arizona Supreme Court found nothing wrong with either the relationship between bar counsel and the Committee or with

the *ex parte* communications, citing *Withrow v. Larkin* to support its view. It went on to note that even if there was a "technical" Due Process violation, it was "cured by our order allowing discovery and by the independent review conducted by both the Commission and this Court." 741 P.2d at 727; Appendix A at page 8.

Petitioner's trial lasted for nine days and resulted in over 2,000 pages of testimony. Out of the four different complaints and nearly twenty different charges, Petitioner was found guilty of only one ethical violation. The court held, in the face of sharply conflicting testimony, that Petitioner had engaged in false, deceptive and misleading television advertising and suspended him from practice for thirty days.

The Court based its finding upon selected evidence that Petitioner used ads which implied that his firm could and would take cases to trial. The ads were found to be misleading because although the firm did a good job of working cases up, it had no experienced trial lawyers and contracted, at its own expense, to have competent, experienced lawyers from other firms try its cases. 741 P.2d at 272-278; Appendix A, at pages 17-18.

Petitioner moved for rehearing and reiterated the Due Process arguments rejected in earlier decisions. He also argued that (1) he was entitled to a neutral and detached finder of fact before whom evidence was taken, (2) the Supreme Court's *de novo* review was not a constitutionally acceptable substitute for that right, (3) the Supreme Court could not weigh evidence or determine witness credibility from a transcript and (4) the existence of an attorney-client relationship between the Committee and bar counsel was a *per se* Due Process violation.

Rehearing was denied without comment and this petition followed.

REASONS FOR GRANTING THE WRIT

Although all three lower tribunals claimed support for their decisions in *Withrow v. Larkin*, 421 U.S. 35 (1975) the two cases are at opposite ends of the spectrum.

In *Larkin*, the investigation was conducted by an agency employee who had no *ex parte* contact with the agency members.

Here, the agency members and their attorneys conducted the investigation together and held numerous *ex parte* meetings to discuss the case.

In *Larkin*, there was no special relationship between the agency and the prosecutors. Here, the prosecutors considered themselves and were considered by the agency as its own attorneys, with whom the agency enjoyed a confidential and privileged attorney-client relationship.[3]

In *Larkin*, probable cause was determined by the agency *only* after a formal, recorded evidentiary hearing which the accused

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[3]Federal courts have not looked upon an attorney-client relationship between the judge and counsel for one party with the same indifference as the Arizona Supreme Court did here. In *Rapp v. Van Dusen*, 350 F.2d 806 (3d Cir. 1965), the court ordered a judge to disqualify himself once the judge had designated attorneys for defendant as his own counsel in plaintiff's mandamus proceeding. The court stated:

> For the proper administration of justice requires of a judge not only actual impartiality, but also the appearance of a detached impartiality. Litigants are entitled, moreover, to a judge whose unconscious responses in the litigation may be struck only in the observing presence of all parties and their counsel. *This right is impaired when a party is required to meet in his opponent an advocate who has already acted as the judge's counsel in the same litigation.*

350 F.2d at 812 (emphasis added). *Accord, Texaco, Inc., v. Chandler*, 354 F.2d 655 (10th Cir. 1965), *cert.denied*, 383 U.S. 936 (1966).

The rule that one should not have to litigate against the judge's lawyer arises from the special relationship between an attorney and his client. As the Arizona Supreme Court acknowledged in *Matter of Neville*, 147 Ariz. 106, 708 P.2d 1297 (1985), those who consider themselves clients depend upon their attorneys for confidentiality and fairness. "Clients can be expected to assume that one whom they have come to look upon as 'their lawyer' will protect them, or, at least, not harm them." 708 P.2d 1302.

The committee viewed bar counsel as its own lawyer in these proceedings. There was a relationship of trust and confidentiality that petitioner's attorney could never approach. Thus, in a case where much of the evidence was disputed and credibility was a key factor, bar counsel had an implicit advantage. As the Tenth Circuit acknowledged in *United States v. Ritter*, 540 F.2d 459, 462 (10th Cir.), *cert.denied*, 429 U.S. 951 (1976), "[B]ias in favor of or against an attorney can certainly result in bias toward the party. Thus, if a judge is biased in favor of an attorney, his impartiality might reasonably be questioned in relationship to the party."

was invited to attend. This insured against the possibility that agency members might make factual determinations after an adversary hearing by "relying upon evidence not then fully subject to effective confrontation." 421 U.S. at 54, n.20.

Here, probable cause evidence was presented orally to the agency members in unreported, informal *ex parte* meetings with the agency's prosecutors.

In *Larkin*, the only concern was whether the *investigative* and adjudicative functions had been impermissibly merged; there was never any question about merging the *prosecutorial* and adjudicative functions because the prosecutor in *Larkin* came from outside of the agency. Here, however, all three functions—investigative, prosecutorial, and adjudicatory—were merged and for a long time the agency proceeded as if these functions were all the same.

Finally, in *Larkin*, the investigative function terminated when evidence was presented at the probable cause hearing. After the hearing, the Agency members met privately and determined whether probable cause existed.

Here, the investigation continued until long after the first set of charges was filed. It extended through the first five days of trial, when the final charge was added. Agency members met several times with the prosecutors to discuss and determine probable cause and to discuss the addition, deletion or modification of the charges.

In short, this case is distinguishable from and far more extreme than *Larkin* because all of the safeguards present in *Larkin* are missing here. It is the very absence of these safeguards that makes this case appropriate for plenary review.

The Court has not decided any case involving a significant merger of the prosecutorial, investigative and adjudicatory functions in the nearly thirteen years since it decided *Larkin*.

Review should be granted because it will allow the Court to apply *Larkin* to a different and much more substantial merger of the prosecutorial, investigative and adjudicative functions. This application will assist lower courts and governmental agencies in resolving a difficult, complex and increasingly common problem of agency organization: how much overlap will the Due Process Clause tolerate between investigation, prosecution and adjudication.

There is a second reason for granting the writ.

This Court has flatly rejected the notion that a trial *de novo* cures Due Process violations in a lower tribunal. *See, Ward v. Village of Monroeville*, 409 U.S. 57, 61-62 (1972):

> [N]or, in any event, may the State's trial court procedure be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication. Petitioner is entitled to a neutral and detached judge in the first instance.

Because the Arizona Supreme Court claimed it could legitimate a constitutionally flawed fact finding procedure by reviewing *de novo*[4] the record generated by that flawed procedure, its decision is utterly at odds with this Court's ruling in *Ward*.

Certiorari should therefore be granted to eliminate any doubt about the extent to which encroachments upon the *Ward* holding will be tolerated by this Court.

CONCLUSIONS

For the reasons set forth above, the Court should issue a writ of certiorari to the Supreme Court of Arizona to review its decision in the instant case.

Respectfully submitted,

Ralph Ogden
Attorney for the Petitioner

WILCOX & OGDEN
910 Chancery Building
1120 Lincoln Street
Denver, Colorado 80203
303-861-5501

January 2, 1988

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[4]There is a fundamental difference between the *trial de novo* offered to Mr. Ward and the *review de novo* offered to the Petitioner. In *Ward*, both the state and the defendant started all over again in the superior court, with no reference

to what happened in the mayor's court. In the case at bar, however, petitioner cannot start all over and make a new record before an impartial fact finder. He can only ask the new fact finder to review what the first one did. The vice of this procedure is that it does not take into account the great probability that because the original fact-finding procedure is tainted, it is incapable of generating a truly fair record upon which the *de novo* review can be based.

Nor does it take into account the nearly impossible task of deciding witness credibility by reading a transcript. *See, Matter of Yamagiwa*, 97 Wash.2d 773, 650 P.2d 203 (1982).

APPENDIX F

Excerpts of Rules 33 and 34 of the Supreme Court of Arizona, Governing Disciplinary Investigations and Prosecutions

These rules were repealed in 1984, but were nonetheless applied to all proceedings in the case at bar.

RULE 33. INVESTIGATION, FILING SYSTEM AND HEARING

* * *

33(B) Investigation, formal complaint, hearings, bar counsel, staff examiner

* * *

2. When a complaint is referred to a committee the committee shall conduct such preliminary investigation as will enable it to determine whether there is probable cause to believe that the member in question is or may be guilty of misconduct justifying disciplinary action. If, after such preliminary investigation, the committee is of the opinion that no such probable cause exists, it shall so report to the board in writing. The board shall advise the complainant, if any, in writing of the action taken by the committee. If, after such preliminary investigation, the committee is of the opinion that such probable cause does exist, it shall conduct such additional investigation as it deems necessary to enable it to institute a formal complaint against the member in question and shall designate one or more active members, other than one of their number, to act as bar counsel in the investigation and presentation of evidence in the matter under consideration. Prompt notice shall be given to the board of the name of bar counsel. As soon thereafter as possible the committee shall prepare a formal complaint against the member stating specifically the acts of misconduct charged and noticing the member in question to appear before the committee at a date certain for a hearing to determine the truth of the charges made against him and whether discipline is warranted. The formal complaint shall be signed by the chairman of the committee.

3. At any stage of investigation the committee may file a written request to the board to provide the committee with one or more staff examiners to aid it in conducting its investigation. The request shall describe in detail the reason why a staff examiner is needed and the scope of the work to be done. The board shall act on the request at its next regular meeting or at a special meeting if time will not permit waiting until the next regular meeting. If the board grants the request, it shall employ a suitable staff examiner for the committee for the purposes described in the re-

quest. The person or persons employed as a staff examiner shall work under the supervision of bar counsel.

4. Staff examiners may but need not be members of the state bar and may be selected from the regular employees of the state bar. The general function of bar counsel and staff examiners in all stages of a disciplinary matter shall be to present all the material facts to the appropriate committee, the board or this court. Their function is not that of a prosecutor.

RULE 34. PLEADINGS AND PROCESS

* * *

34(C) Amendment. The committee at any time prior to the conclusion of the disciplinary hearing may allow amendments to the formal complaint or answer. The formal complaint may be amended to conform to the proof or to include further charges, whether occurring before or after the commencement of the disciplinary hearing. If an amendment to the formal complaint is made, respondent shall be given reasonable time to answer the amendment, to produce evidence and to respond to the charges.

APPENDIX G

Letter from Lead Bar Counsel Edwin F. Hendricks to the Chairman of Special Administrative Committee S-25

MARTORI, MEYER, HENDRICKS & VICTOR
A PROFESSIONAL ASSOCIATION

Paul J. Meyer	**Joseph P. Martori**	**Suite 4000**
Edwin F. Hendricks	**David Victor**	**2700 North Third St.**
Jones Osborn II	**William J. Maldeon**	**Phoenix, AZ 85004**
Larry A. Hammond	**Seffrey L. Sellers**	**602-263-8700**
Randall C. Nelson	**James E. Scarboro**	
Lucia A. Faronas	**Donald W. Bivins**	
R. Douglas Dalton	**Mark S. Wallace**	**Telex/TWX**
Vincent F. Chiappetta	**Ron Kilgard**	**910-950-1101**
Thomas M. Curzon	**Jay I. Moyes**	**Telecopy (24 Hours)**
Donald M. Peters	**David G. Campbell**	**602-266-6751**
Helen C. Grimwood	**Parker C. Folse**	
Michael B. Witney	**James A. Bush**	**FILE NO.**
Gary A. Gotto		

July 1, 1983

CONFIDENTIAL
M. Jeremy Toles
Chairman, Special Administrative
Committee S-25
1010 East Jefferson Street
Phoenix, Arizona 85004

Re: Special Administrative Committee S-25

Dear Jerry:

The purpose of this letter is to bring you up-to-date on various developments in the above-referenced matter.

First, as you know, on Tuesday, June 28, the Arizona Supreme Court denied jurisdiction in the special action filed by Messrs. Zang and Whitmer. Therefore, we should move ahead with discovery and a hearing.

Second, as I mentioned during our phone conversation yesterday, it would be helpful if you would issue an order giving the respondents and their counsel a deadline for responding to our

long-standing discovery requests which were the subject of their Motion for Protective Order and subsequent special action.

Third, Walter Cheifetz and I have tentatively agreed to reschedule the following depositions for the following dates:

a. Mr. Cheifetz will depose Esther Adams on July 11.

b. We will depose Robert Bartkus, an investigator for Zang & Whitmer, on July 12. We are also attempting to schedule the deposition of Candi Bartkus, a former secretary/paralegal employed by Zang and Whitmer, for the afternoon of July 12.

c. We will depose Messrs. Zang and Whitmer on July 13.

d. We will attempt to schedule the deposition of the Custodian of Records of Good Samaritan Hospital vis-a-vis the Lucien T. Smith hospitalization sometime during the week of July 11.

e. Mr. Cheifetz will depose Kathy Hillman on August 12. Miss Hillman has requested this delay since she wants Don Wilson from her office to be present to represent her during her deposition and Mr. Wilson will be out-of-town during the entire month of July.

f. Undoubtedly, there will be other depositions scheduled, including perhaps the depositions of Mrs. Lucien T. Smith, various other ex-Zang & Whitmer employees and/or various insurance adjusters and claims managers with whom Zang & Whitmer have dealt with over the past several years.

Fourth, Mr. Cheifetz and I have tentatively agreed to re-schedule the disciplinary hearing for September 6 through 8. Since these dates require a further 60-day extension from the Board of Governors, I have asked Mr. Cheifetz to stipulate to a waiver of the time requirements set forth by the Supreme Court Rules and he has agreed to do so. I will forward the executed Stipulation as soon as it is ready so that you can sign it and forward it to the Board for ratification.

Fifth, this is to confirm that you and the other Committee members will meet with me and other Bar counsel who are available at 7:00 a.m. on Tuesday, July 5 at the Phoenix Country Club Men's Grill for the purpose of discussing a proposed Amended

Complaint. As I mentioned, at a minimum, we believe we should (a) re-examine Counts 8 (costs padding), 9 (rejection of subrogation claims) and 10 (tape-recording without consent) to determine whether these counts indeed set forth an ethical violation; (b) clarify Count 6 (Lucien T. Smith) to reflect the additional facts we have gleaned from our investigation and discovery to date; (c) add references in our advertising counts to various advertisements which have come to our attention through our investigation and discovery; and (d) add other allegations of ethical violations which have come to our attention since the filing of our original complaint.

We will, of course, keep you advised of further develop-ments as they occur.

Very truly yours,

Edwin F. Hendricks

cc: James M. Marlar, Esquire
Dennis I. Wilenchik, Esquire
Frank Lewis, Esquire
C. Owen Paepke, Esquire
Michael M. Sophy, Esquire
David G. Campbell, Esquire

APPENDIX H

Excerpt of Answers to Interrogatories By David G. Campbell, Associate Bar Counsel, About the July 5, 1983, Meeting

Answer: A breakfast meeting was held on July 5, 1983 between the Committee and Bar Counsel. I recall that Jerry Toles, Ed Hendricks, and I were in attendance. I recall that one of two others were also present, but I do not remember whether they were Owen Paepke, Frank Lewis, Jim Marlar, or Dennis Wilenchik. The purpose of the meeting was to report the results of Bar Counsel's ongoing investigation and research. Although I do not recall the precise words that were spoke, I believe the substance of the communications was as follows.

I suggested that the committee revise count three to delete allegations that the Respondents' advertisements were "lurid and not presented in a dignified manner." I explained my view that any discipline based upon such allegations would violate the Respondents' rights under the First Amendment. I suggested that count three be limited to allegations of misleading advertising, provided the committee found probable cause to support such allegations.

I suggested that respondent Whitmer's name be deleted from count four of the complaint. I explained that my interviews with former paralegals from the Respondents' office and other witnesses suggested that Mr. Whitmer did not make representations of specialization or special expertise to potential clients.

I suggested that the allegations of count five be modified to allege only that Respondent Zang had directed paralegals to deal with both potential and existing clients as though they were attorneys authorized and licensed to practice law. In the original complaint, this allegation had been made against Respondent Whitmer as well. I explained to the Committee that my interviews with former paralegals from the Respondents' firm and other witnesses had suggested that Mr. Whitmer did not directly engage in this conduct. Because those interviewed had told me that Mr. Whitmer was aware of these instructions to paralegals by Mr. Zang, I suggested that the Committee further modify count five to allege upon information and belief that Mr. Whitmer knew of this conduct and permitted it to continue.

One of the Bar Counsel attending the meeting (I do not recall which) suggested that the Committee revise count six of the complaint. Count six had originally alleged that Respondent

Zang settled the personal injury of Lucien T. Smith after Mr. Smith's death. Investigations conducted by Frank Lewis, and documents provided by the Respondents, had demonstrated that Mr. Smith's claim was settled before his death. These facts had been disclosed by Frank Lewis to the Committee at an earlier hearing attended by the Respondents' counsel. At that hearing, Mr. Lewis had suggested that the Committee drop count six from the complaint. At the July 5, 1983 meeting, the Committee inquired about the circumstances under which Mr. Smith's claim had been settled. We explained to the committee the results of our investigation. That the power of attorney used by the respondents to execute the settlement drafts had been obtained from Mr. Smith while he was hospitalized shortly before his death, and had been used to execute the settlement drafts after he had died. Esther Adams had told us that Bob Bartkus had obtained the power of attorney, and that upon returning from the hospital Mr. Bartkus had indicated that Mr. Smith was so ill that Mr. Bartkus had to help him sign the power of attorney. Esther Adams had also told us that Mr. Zang knew Mr. Smith was dead when he used the power of attorney to endorse the settlement draft. On the basis of this explanation, the Committee decided to amend count six to allege that the power of attorney had been obtained under questionable circumstances and had been knowingly used after its expiration.

I suggested to the Committee at the July 5, 1983 meeting that count seven of the complaint be amended. Count seven concerned alleged alterations of medical reports by Mr. Zang. I suggested that count seven would be more precise if it alleged, as Bar Counsel had been informed by various former paralegals from Respondents' offices, that these alterations were made with the intent to misrepresent to insurance companies the condition of the respondents' clients. Ed Hendricks and I further explained to the Committee that Joyce Martone, a former paralegal from the Respondents' office and Esther Adams, also a former paralegal, had indicated during interviews that Respondent Whitmer was aware of these alterations of medical reports. We therefore suggested that count seven be amended to allege, upon information and belief, that Re-

spondent Whitmer knew of this improper conduct and permitted it to continue.

I suggested that count eight of the original complaint be dropped. I explained to the committee that I had interviewed a number of former paralegals from the Respondents' office, and one or two former clients. These witnesses had told me that they knew of no instances in which the Respondents charged clients for investigatory and photographic costs without prior authorization or explanation.

Ed Hendricks and I explained to the Committee the results of our ongoing investigation. We explained that we had learned from the American College of Legal Medicine and the American Academy of Forensic Sciences that Mr. Zang was not a fellow in those organizations as he claimed. We told the Committee that this information had been obtained by telephone, and was in the process of being confirmed in writing. We provided the Committee with copies of various newspaper and magazine advertisements run by the Respondents in 1980, and various letters mailed by the Respondents in 1980 and 1981, all of which claimed that Mr. Zang was a fellow in both organizations. On the basis of these investigative findings, we suggested that the Committee add a new count regarding Mr. Zang's claimed fellowships to the complaint, and that the new allegations be designated count eight.

I explained to the Committee that I had recently appeared in the Arizona Supreme Court and represented the State Bar in opposing the Respondents' petition for special action. I told the Committee that during that hearing Justice Feldman had questioned me about the contents of count nine of the complaint. In the original complaint, count nine alleged that the respondents had settled a client's personal injury claims with two insurance companies. During his questioning, Justice Feldman stated that dual settlements were legal and appropriate for personal injury claims, but were improper for property damages claims. I returned to my office after the hearing and researched the questions raised by Justice Feldman. I determined from that research that a dual settlement for personal injury claims was, in fact, appropriate, but that a dual settlement of property damage claims was clearly improper. Having reached this conclusion, I again

interviewed Esther Adams to determine the nature of the settlement that had been obtained by the Respondents on behalf of their client. Esther Adams told me that the settlement she recalled had been made on behalf of Betty Daniels, and that Mr. Zang had settled Ms. Daniels' property damage claim with two different insurance carriers. I recounted the results of my research and my interview with Esther Adams to the Committee, and suggested that it amend count nine to drop the allegation regarding personal injury claims and add allegations regarding dual settlement of a property damage claim.

One of the Bar Counsel (I do not remember which) suggested that the Committee drop count ten from the complaint. Bar counsel explained that interviews with former paralegals and additional witnesses, and letters obtained from the Respondents or other sources, had failed to substantiate the allegations of count ten.

I believe that the above statements and explanations by Bar Counsel constituted virtually all of the communications that occurred at the July 5, 1983 breakfast meeting. I do not recall Mr. Toles, or any other member of the Committee who might have been present, making any remarks. I recall the meeting as being primarily a presentation by Bar Counsel of the results of our ongoing investigation. To the best of my recollection, the Committee did not discuss Bar Counsel's recommendation during the July 5, 1983 breakfast meeting, and did not make a decision in our presence. Instead, the Committee retired to deliberate on its own regarding these matters, and Bar Counsel left the Phoenix Country Club to return to their offices. I believe that the chairman of the Committee, Jerry Toles, called me later in the day to inform me that the Committee had decided to accept virtually all of Bar Counsel's recommendations. I accordingly revised the complaint to reflect the Committee's decision, sent it to Jerry Toles for his signature, and mailed the complaint to Respondents' counsel later that day. Attached is a July 5, 1983 letter that I sent to Walter Cheifetz enclosing the Committee's new complaint.

I recall that Bar Counsel's communications at the July 5, 1983 meeting were carefully limited to reporting the results of Bar Counsel's investigation. I recall being impressed during the

meeting by the fact that all of the discussions were conducted in a professional and objective manner, that no negative or derogatory comments were made about the Respondents, and that there was no discussion of the merits of the matters we were discussion or the manner in which the Committee should or would eventually rule on the allegations of the complaint.

87-1114

No. 87-

In the

Supreme Court of the United States

OCTOBER TERM, 1987

C. PETER WHITMER,
Petitioner,

v.

THE STATE BAR OF ARIZONA

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

RALPH OGDEN
Attorney for the Petitioner

WILCOX & OGDEN
910 CHANCERY BUILDING
1120 LINCOLN STREET
DENVER, COLORADO 80203
303-861-5501

JANUARY 2, 1988

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APPENDIX A

OPINION OF THE SUPREME COURT OF ARIZONA

Issued on July 8, 1987

In the

Supreme Court of the State of Arizona

En Banc

In the Matter of	
	No. SB-86-0014-D
STEPHEN M. ZANG and C. PETER WHITMER,	
Members of the State Bar of Arizona,	
Respondents.	

ORIGINAL PROCEEDING FOR DISCIPLINARY ACTION

Disciplinary Commission Nos.
82-1-S25, 82-7-S25, 82-9-S25, 82-12-S25,
82-14-S25, 83-1-S25, and 83-3-S25

Respondents Suspended
Filed July 8, 1987

FELDMAN, Vice Chief Justice

In 1982, the State Bar charged attorneys C. Peter Whitmer and Stephen M. Zang ("respondents") with numerous ethical violations. The charges were presented to Special Local Administrative Committee S-25 of the State Bar (the "Committee"), which found Zang and Whitmer guilty of six ethical violations. The Committee recommended that Zang be suspended from the practice of law for one year and that Whitmer be suspended for six months. *See* Former Rules 31-35, Ariz.R.S.Ct., 17A A.R.S.[1]

Zang and Whitmer presented objections to the Committee's findings and recommendations to the Disciplinary Commission of the Supreme Court of Arizona (the "Commission"). After independently reviewing the record, hearing oral argument, and

questioning respondents, the Commission affirmed five of the six ethical violations found by the Committee.[2] Specifically, the Commission found: first, that Zang and Whitmer had engaged in false and misleading advertising; second, that Zang had falsely presented himself, in advertisements and letters, as a Fellow of the American Academy of Forensic Sciences and of the American College of Legal Medicine;[3] third, that Zang had knowingly failed to honor a subrogation right; fourth, that Zang knowingly had accepted money tendered in error as part of a personal injury settlement; and fifth, that Zang had collected an excessive fee.[4] The Commission recommended that Zang be suspended for one year, Whitmer for ninety days.

Zang and Whitmer filed objections to the Commission's report with this court. They disputed the Commission's findings and recommendations with respect to each of the charges. Respondents also argue that they were denied their due process right to have the charges adjudicated by a fair and impartial tribunal.

We review respondents' objections as an independent trier of fact and law. *In re Kersting*, 151 Ariz. 171, 172, 726 P.2d 587, 588 (1986); *In re Neville*, 147 Ariz. 106, 108, 708 P.2d 1297, 1299 (1985). Although findings of the Committee and the Commission are entitled to "great weight," particularly when they turn on the credibility of witnesses, we will not impose discipline unless our independent review of the record convinces us that the Bar's charges are supported by clear and convincing evidence. We must be convinced, in other words, that the truth of the Bar's allegations is "highly probable." *Neville*, 147 Ariz. at 111, 708 P.2d at 1302; *accord Kersting*, 151 Ariz. at 172, 726 P.2d at 588.

I. DUE PROCESS

Under the due process clause of the fourteenth amendment, respondents were entitled to a fair hearing before an impartial tribunal. *Withrow v. Larkin*, 421 U.S. 35, 46-47, 95 S.Ct. 1456, 1464 (1975); *In re Davis*, 129 Ariz. 1, 3, 628 P.2d 38, 40 (1981). Respondents claim that the Committee violated their right to a fair hearing in several ways. We turn first to the procedure

followed by the Committee and then to the specifics of respondents' arguments.

A. Procedural Background

The procedural facts giving rise to respondents' allegations are essentially undisputed. The State Bar assigned this matter to the Committee for investigation after receiving numerous complaints about respondents' practice and advertisements. The Committee appointed bar counsel, who investigated Zang and Whitmer during the fall of 1982. The investigation resulted in formal charges, contained in a ten-count complaint issued by the Committee on December 14, 1982. Respondents answered the complaint and then filed numerous motions alleging lack of notice, improper discovery requests, and lack of probable cause. Their motions were denied by the Committee. Respondents filed a special action,[5] but we declined jurisdiction on June 28, 1983.

On July 1, 1983, Edwin F. Hendricks, lead bar counsel, wrote to the Committee chairman scheduling a meeting with the Committee for July 5. The purpose of the meeting, according to the letter, was to discuss amending the complaint in light of interviews and research conducted by bar counsel during the six months since the complaint was filed. The letter also requested an "order giving the respondents and their counsel a deadline for responding to our long-standing discovery requests. . . ."

The July 5 meeting was attended by two of the three Committee members and all bar counsel. Respondents' subsequent objections to the meeting and their efforts to discover the subjects discussed at the meeting, including the July 1 letter summarized above, were initially rebuffed by bar counsel's assertion of the attorney-client privilege. Mr. Hendricks, however, did give respondents an affidavit describing the general nature and content of the meeting.[6]

Consistent with Mr. Hendricks's prior affidavit, subsequent discovery permitted by this court revealed that the July 5 meeting was limited to a report of bar counsel's ongoing investigation and research. Bar counsel suggested that numerous charges be dropped, that other charges be modified to conform to the evidence discovered as of that date, and that one new charge be added.

The Committee members present did not discuss the evidence in the presence of bar counsel. All three Committee members met later that day, without bar counsel, and decided to accept bar counsel's recommendations. No ex parte contacts between bar counsel and the Committee occurred after July 5, 1983, other than a few letters involving scheduling matters and one letter requesting bar counsel to explain which counts had been deleted from the complaint.

In August 1983, respondents filed motions to disqualify the Committee and bar counsel. The respondents' motions were based on bar counsel's ex parte contact with the Committee at the July 5 meeting and on the notion that the Commmittee had improperly combined investigative, prosecutorial, and adjudicative functions. After a hearing on these and other pretrial motions, the Committee denied respondents' motions for disqualification.

Respondents' disciplinary hearing before the Committee commenced six months after the July 5 meeting. The hearing occurred between January 23 and January 27 and between March 21 and March 24, 1984. At the end of the January session, the complaint was amended to add an additional charge. Respondents were not required to defend against the additional charge until the March session.

Unsuccessful before the Committee, respondents presented their due process arguments to the Disciplinary Commission during its review of the Committee's decision. After independently reviewing the record, the Commission unanimously concluded that "members of Special Administrative Committee S-25 were not biased [or] prejudiced," and that "[t]he conduct of Bar Counsel and the members of Special Committee S-25 did not constitute a denial of due process or of Respondents' right to a fair hearing." Commission Report ("CR"), at 7-8.

B. Discussion

1. Merging Investigative, Prosecutorial, and Adjudicative Functions

Respondents argue that the Committee deprived them of their due process right to an impartial tribunal by improperly com-

bining the roles of investigator, prosecutor, and adjudicator. This argument is not supported by either our former rules or well-established precedent.

Former Rule 33(b)(2) required the Committee to conduct a preliminary investigation to determine whether there was probable cause, to conduct "such additional investigation as it deem[ed] necessary," and then, if warranted, to issue a formal complaint. Once the Committee issued a complaint, former Rule 35 required it to hold a formal hearing, decide the merits of the complaint, and then recommend discipline to the Commission and this court. The rules also authorized the Committee to select bar counsel to aid in the investigation and presentation of evidence. Former Rule 33(b)(2); *see also* Former Rule 33(b)(3) (staff examiners may be employed to conduct the investigation "under the supervision of bar counsel").

We rejected a procedural due process challenge to our former rules in *Davis, supra.* Relying on the United States Supreme Court's decision in *Withrow, supra, Davis* held that the Committee properly may conduct the initial investigation, determine probable cause, and then adjudicate the merits of a disciplinary action. 129 Ariz. at 3, 628 P.2d at 40. *Withrow* reasoned that these three functions have different purposes and are based on different evidence and standards. Consequently, just as judges may "issue arrest warrants on the basis" of probable cause and then preside over the defendant's criminal trial, Committee members may "receive the results of investigations, . . . approve the filing of . . . formal complaints instituting enforcement proceedings, and then . . . participate in the ensuing hearings. This mode of procedure does not violate . . . due process of law." *Withrow,* 421 U.S. at 56, 95 S.Ct. at 1469; *see also id.* at 52, 95 S.Ct. at 1467 quoting 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 13.02, at 175 (1958)) ("[t]he case law, both federal and state, generally rejects the idea that the combination [of] judging [and] investigating functions is a [per se] denial of due process"); *Davis,* 129 Ariz. at 3, 628 P.2d at 40.

We reaffirm the principles announced in *Davis.* Committee members are people of integrity, legal training, and intellectual discipline, capable of determining probable cause and then fairly

and impartially adjudicating the merits of a disciplinary action. Accordingly, we hold that the procedures authorized by our former rules do not violate due process of law.

The Committee's actions in the present case were clearly within the bounds set by our former rules. The procedures used here are far less troublesome than those upheld in either *Davis* or *Withrow*. In this case, the Committee ordered bar counsel to conduct an investigation. The Committee then determined probable cause on the basis of evidence submitted by bar counsel. Under *Davis* and *Withrow*, the Committee could have conducted the initial investigation itself, instead of limiting its prehearing role to determining probable cause. Surely, if the Committee could have conducted the initial investigation itself, thus exposing its members to a firsthand look at the evidence, it is permissible for the Committee to play a more limited role by appointing bar counsel to assist it. *See Davis; Withrow.*

2. Specific Objections Alleging Actual Bias or Advocating a Per Se Rule

Withrow and *Davis* recognize, of course, that combining investigative and adjudicative functions in one body creates some potential for prejudgment bias and prejudice. Both cases, however, place the burden on respondents to prove at least a significant likelihood of actual prejudice. "Without a showing to the contrary, we assume that Committee members are 'capable of judging a particular controversy fairly on the basis of its own circumstances.' " *Withrow*, 421 U.S. at 55, 95 S.Ct. at 1468 (quoting *United States v. Morgan*, 313 U.S. 409, 421, 61 S.Ct. 999, 1004 (1941)); *accord Davis*, 129 Ariz. at 3, 628 P.2d at 40.

Respondents argue that three of the Committee's actions were sufficiently egregious to demonstrate actual bias or to warrant application of a per se rule: (1) the Committee's agreement to amend the complaint, (2) its ex parte contact with bar counsel at the July 5 meeting, and (3) its agreement to bar discovery of the July 5 meeting on the basis of the attorney-client privilege.

Respondents' first argument does not require extended discussion. Former Rule 33(a)(1) authorized the Committee to bring charges by request of the Commission, this court, or "upon its

own motion." Former Rule 34(c) authorized the Committee to amend the complaint "to include further charges, whether occurring before or after the commencement of the disciplinary hearing." *In re Riley*, 142 Ariz. 604, 609, 691 P.2d 695, 700 (1984), upheld this power to amend, "so long as care is taken to assure that the respondent has a reasonable time and an appropriate opportunity to respond to the additional charges. . . ." Here, the complaint was amended at the close of the January session of the disciplinary hearing. Respondents did not have to defend against the additional charge until the March session, at which time respondents' attorneys assured the Committee: "We are prepared to defend against those two particular cases." Hearing Transcript ("HT") Vol. II (2d Sess.), at 142-43. We hold that respondents had sufficient time to meet the charges.

We also are unpersuaded that the July 5 meeting between Committee members and bar counsel violated respondents' due process rights. Respondents rely on *Western Gillette, Inc. v. Arizona Corporation Commission*, 121 Ariz. 541, 592 P.2d 375 (App. 1979), but that case does not support their argument. The ex parte contacts in *Western Gillette* took place after an evidentiary hearing, before the commission had ruled on the merits. The attorneys involved in the ex parte communications commented on the evidence and even provided the commission with a proposed form of judgment that later was adopted without notice to the opposing parties. On these facts, the court of appeals correctly held that *"participation in the actual decision making process by only one party* to a controversy is inimical to the notions of fairness which underlie the due process of law." 121 Ariz. at 542, 592 P.2d at 376 (emphasis added).

In the present case, bar counsel did not participate in the actual decision making process. The July 5 meeting concerned probbable cause and amendments to the complaint, not the merits of the charges. Furthermore, the July 5 meeting occurred more than six months before the disciplinary hearing began. The broad discovery we allowed respondents to conduct into the nature and content of the July 5 meeting uncovered no hint of unfairness or bias. On these facts, the July 5 meeting is indistinguishable from the ex parte investigations upheld in *Davis* and *Withrow*.

We are unwilling to hold that four years of discovery, hearings, and appellate review must be disregarded on the basis of an innocuous one-hour meeting.

Furthermore, even if the July 5 meeting had been a technical violation of respondents' procedural due process rights, any error has been cured by our order allowing discovery and by the independent, de novo review conducted by both the Commission and this court. Far more egregious ex parte contacts than occurred here have been cured by de novo review or by notifying the opposing party of the contact and then allowing further hearings, discovery, or argument. *See, e.g., McElhanon v. Hing*, 151 Ariz. 386, 728 P.2d 256 (1986) (ex parte contact with judge cured by notice, further argument, and judge's ability to disregard ex parte communication), *cert. denied*, _____U.S._____, 107 S.Ct. 1956 (1987); *State ex rel. Corbin v. Arizona Corporation Commission*, 143 Ariz. 219, 693 P.2d 362 (App. 1984) (ex parte contacts between attorney and commission member cured by removing offending officer, reviewing the record, and allowing additional argument and briefing by the parties); *In re Logan*, 71 N.J. 583, 367 A.2d 419 (1976) (prosecutor's participation in disciplinary committee's deliberations cured by de novo review).

Finally, respondents argue that bar counsel's initial assertion of the attorney-client privilege to block discovery about the July 5 meeting constituted an independent due process violation. Respondents assert that a per se rule is justified because the Committee "viewed bar counsel as its own lawyer in these proceedings," creating "a relationship of trust and confidentiality" between bar counsel and the Committee "that Zang and Whitmer's attorney could never approach." Respondents' Supplemental Brief, at 6.

Respondents' assertion that bar counsel enjoyed an improper relationship of trust and confidence with the Committee is unsupported by the record. Neither respondents' discovery nor our search of the hearing record revealed any evidence of bias or of a confidential or favored relationship between the Committee and bar counsel. On the contrary, the record reveals a consistent effort by the Committee to be fair and impartial. The Committee ruled against bar counsel on numerous issues, substantive

as well as procedural; nothing suggests that the Committee favored bar counsel. As the Committee's investigators, bar counsel communicated to the Committee nothing more than investigative information. As the Committee's counsel, bar counsel provided nothing more than legal advice on procedural issues, such as amending the complaint. Because the Committee could have acted as its own investigator and advisor and reviewed the same evidence firsthand, *see ante*, bar counsel did not violate due process by communicating the results of its investigation to the Committee. Respondents' due process rights were not violated in this case.[7]

II. FALSE AND MISLEADING ADVERTISING

A. Background

Zang and Whitmer are charged with false and misleading advertising in violation of DR 2-101(A) and DR 1-102(A)(4), which stated, respectively:

(A) A lawyer shall not, on behalf of himself, his partner, associate or any other lawyer affiliated with him or his firm, use or participate in the use of any form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim.

(A) A lawyer shall not:

* * *

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

This charge is based on four print and nine video advertisements that appeared in Phoenix-area newspapers and on Phoenix-area television stations during 1982 and 1983.

All four print advertisements contained the bold-faced caption *"Law is Civilized Warfare!"* above a picture of Zang and Whitmer and to the left of the following language:

We're the [or "a"] personal injury law firm:

*with the medical experience to understand complicated evidence

*with investigators to find witnesses and hidden evidence
*with computers for speed, accuracy and research,

Free Consultation
No recovery—no attorneys' fee

Each print advertisement also contained a photograph and a statement emphasizing some aspect of respondents' practice. The photographs featured either a judge in a courtroom, a computer circuit board leaning against several books about accident cases and medicine, a large reproduction of a fingerprint, or a woman sitting in a witness box. Beneath one of these photographs, each advertisement featured one of the following statements:

If you're in an accident . . .
You need a lawyer with facts and know-how
not just words.
Detailed Preparation
is part of Zang & Whitmer, Chtd. because:
the better your case is **prepared for trial,**
the more likely your case will settle out of court
without delay or hassles. (emphasis added)
If you're in an accident . . .
You need more than a lawyers' [sic] words!
Medicine and Law
are combined at Zang and Whitmer, Chtd. because:
to prove serious injury and future suffering,
your lawyer must have the knowledge to
make complicated medical facts clear for
the jury. (emphasis added)
If you're hurt in an accident . . .
You need more than a lawyer's words!
Licensed Investigators
are part of Zang and Whitmer, Chtd. because:
an investigator searches out witnesses,
examines evidence at the accident
scene, and discovers the facts **essential**
for victory in the courtroom. (emphasis added)
If you're hurt in an accident . . .

You need a lawyer with facts and know-how,
not just words.
Evidence
is part of Zang & Whitmer, Chtd. because:
the defense will use words and
opinions to minimize their fault and
your injuries. Only proof of facts
will stop them. (emphasis added)

Like the print advertisements, respondents' television advertisements emphasized the advantages of investigators and medical knowledge. The television advertisements also were very dramatic. They featured an authoritative-sounding narrator and either frenetic or peaceful music as a backdrop for pictures of an automobile accident, a worried couple in a hospital waiting room, or a father kissing his daughter goodbye, apparently for the last time. Each of the television advertisements ended with a climactic scene showing Mr. Zang arguing before a jury in a courtroom, with the viewer visually located behind the jury box.[8]

The Committee and the Commission concluded that respondents' advertisements portrayed respondents as willing and able to take, and as actually taking, personal injury cases to trial. The Committee and the Commission concluded that the advertisements were false and misleading because, in fact, respondents "scrupulously avoided" taking cases to trial. CR, at 11-23; Committee Opinion ("CO"), at 10-16.

B. Discussion

1. Constitutional Protection

We note at the outset that respondents' advertisements are "commercial speech" protected by the first amendment. *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2691 (1977). As respondents candidly acknowledge, however, the proscription of false and misleading advertising in DR 2-101 is constitutionally unobjectionable. *See Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 638, 105 S.Ct. 2265, 2275 (1985) (state may "prevent the dissemination of commercial speech that is

false, deceptive, or misleading"); *In re R.M.J.*, 455 U.S. 191, 202-03, 102 S.Ct. 929, 937 (1982) (same); *Friedman v. Rogers*, 440 U.S. 1, 9-10, 99 S.Ct. 887, 894 (1979) (same); *Bates*, 433 U.S. at 383, 97 S.Ct. at 2709 (same); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-72, 96 S.Ct. 1817, 1830-31, (1976) (same).

"[T]he extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides. . . ." *Zauderer*, 471 U.S. at 651, 105 S.Ct. at 2282; *see also Virginia State Board of Pharmacy*, 425 U.S. at 780-81, 96 S.Ct. at 1834-35 (Stewart, J., concurring). Consequently, false or misleading commercial speech has little or no constitutional value and may be "prohibited entirely." *R.M.J.*, 455 U.S. at 203, 102 S.Ct. at 937. "Indeed, the elimination of false and deceptive claims serves to promote the one facet of commercial . . . advertising that warrants First Amendment protection—its contribution to the flow of *accurate and reliable* information *relevant to* public and private *decision making*." *Virginia State Board of Pharmacy*, 425 U.S. at 781, 96 S.Ct. at 1835 (Stewart, J., concurring) (emphasis added); *cf. Zauderer*, 471 U.S. at 651, 105 S.Ct. at 2282 (state bar may constitutionally require attorneys to include additional information to assure that advertisements are not misleading).

In short, the constitution does not prevent discipline in this case if respondents' advertisements were false and misleading.[9] We therefore, must determine (1) what message respondents' advertisements conveyed, and (2) whether that message was false or inherently misleading.

2. The Message

The Committee and the Commission found that at least one of the messages conveyed by respondents' advertisements was that the law firm of Zang & Whitmer was willing and able to try, and actually did try, personal injury cases. The Commission concluded that respondents' print advertisements plainly suggest that attorneys at Zang & Whitmer "prepare cases for trial, combine medicine and law to present facts clearly to the jury, do presentations to juries, use investigators to aid in obtaining vic-

tory in the courtroom, and prove facts and defeat defenses in court." CR, at 14. In like manner, it found that respondents' television advertisements suggest "that Zang and Whitmer take cases to court and argue before juries." *Id.* at 15. After reviewing the record, we agree that respondents' advertisements would "be interpreted by a reasonable person as representations that Respondents have an unusually high level of expertise and experience in personal injury law, specifically including trial experience." *Id.* at 15-16.

Both the bar and the respondents called advertising and advertising law experts. The experts gave their opinions regarding the message conveyed by respondents' advertisements. With all deference to the experts, and without deprecating or passing upon the admissibility of their opinions, we find no need to rely upon expert testimony to interpret the messages conveyed by the advertisements in evidence. As a matter of common sense, we find that depicting a lawyer trying a case conveys the idea that the lawyer tries cases. When Zang is shown arguing a case to a jury, the message is that Zang argues cases to juries. Accordingly, we hold that one message conveyed by respondents' advertisements was that Zang & Whitmer had tried personal injury cases in the past and were ready and able to prepare future cases for trial and to try them.

3. Were Respondents' Advertisements Misleading?

The Committee and the Commission found that respondents' advertisements were false and misleading because they did not accurately portray respondents' practice. Zang & Whitmer was formed in 1979. From that time until the advertisements at issue appeared in 1982 and 1983, no attorney at Zang & Whitmer had tried a personal injury case to a conclusion. HT Vol. IV (2d Sess.), at 265. Zang and Whitmer personally started only one trial, but a mistrial was declared after the first witness testified. *Id.* at 265-67.

Zang, who holds a medical as well as a legal degree, has experience as a medical trial consultant, but has never tried a personal injury case. He conceded that although he felt fully capable of preparing personal injury cases for trial, he is not competent

to try a personal injury case. *Id.* at 270; CR, at 22. Whitmer has criminal trial experience, having spent several years with the county attorney's office shortly after he graduated from law school. His only personal injury trial experience, however, consists of three or four trials that occurred more than ten years ago. HT Vol. II (2d Sess.), at 90-91, 155-56.

Most importantly, Zang & Whitmer consciously followed a firm policy of not taking cases to trial. CR, at 16. Respondents believed that pretrial settlements invariably obtained better results for their clients. They settled cases before trial whenever possible. In the few cases where a trial was necessary, respondents' policy was to refer cases to trial lawyers in other firms. *Id.* at 16, 20; CO, at 10-16. Thus, as the Commission concluded, "while [respondents] represented themselves as having the willingness to try cases, they in fact scrupulously avoided" litigation or trial work of any kind. CR, at 22.

The evidence clearly demonstrates that respondents did not offer the trial services portrayed in their advertisements. Contrary to their print advertisements, respondents had not and did not prepare cases for trial, "make complicated medical facts clear for the jury," or strive for "victory in the courtroom." Nor did they argue cases in front of juries as their television advertisements suggested. Their intention was to settle all cases. Even if a settlement could not be reached, respondents had no intention of personally taking their clients' cases to trial.

We agree with the Committee and the Commission that respondents' advertisements were false and misleading. When consumers "choose[] a lawyer through the advertising process, [they] ha[ve] a right to expect that [their] lawyer will be able and willing to act in the manner represented. In this case, it is clear that respondents had no intention of taking a case personally to trial, and that express and implied representations of their courtroom abilities were false, misleading, and untruthful." CR, at 22-23.

4. Respondents' Objections

Respondents argue that their advertisements were not false because they accurately suggest only that Zang & Whitmer has

an unusually high level of expertise in personal injury law, which occasionally includes trial work. Respondents support this assertion with two pieces of evidence: the expert testimony of Professor Gerald Thain and statistics about the frequency of litigation in personal injury cases.

According to Professor Thain, a law professor specializing in advertising law, respondents' advertisements suggest that Zang & Whitmer will do what is necessary to get the best possible result for its clients, including going to court, if necessary. This suggestion is not misleading, according to Professor Thain, because the references to trial work add little to the public's *preexisting* perception that all lawyers appear in court. Because the public already incorrectly believes that all lawyers appear in court, consumers will not be misled further by respondents' references to trial work.

Professor Thain's testimony does not aid respondents' cause. As Professor Thain conceded, because respondents personally were unwilling and unable to take cases to court, their advertisements technically were false. Furthermore, that some consumers incorrectly believe that all lawyers routinely appear in court, does not give respondents license to present their practice in a false light. Disciplinary Rule 2-101(A) prohibits false and misleading claims, even if those claims serve only to reinforce consumers' prior misconceptions.[10]

Respondents' second argument is that their advertisements were not misleading because respondents "litigated" as many cases as most other personal injury attorneys and also referred cases to outside trial counsel when necessary. The evidence fails to support these assertions. Expert testimony established that approximately five percent of the personal injury cases *that have been filed* go to trial. *See* HT Vol. III (1st Sess.), at 66; HT Vol. IV (1st Sess.), at 73. Zang testified that Zang & Whitmer filed complaints in only approximately five percent of their cases in 1980. None of those cases actually was tried by anyone from Zang & Whitmer. Indeed, Zang was unable to remember even taking depositions in more than a handful of cases.

There was no expert testimony on the percentage of cases in which lawyers file complaints. However, because most personal

injury attorneys actually take five percent of their cases to trial and most cases settle before trial, it is fair to assume that most lawyers file complaints in far more than five percent of their personal injury cases. In this context, Zang's assertion that five percent of respondents' cases were "in litigation" in 1980 does not establish that Zang & Whitmer actually maintained the type of trial practice portrayed in its advertisements. Because ninety-five percent of respondents' cases were not filed, there could have been no discovery, no production of documents, none of the usual preparation for the "civilized warfare" of courtroom confrontation which was the theme of respondents' advertising campaign.

The evidence regarding respondents' referral practice is similarly inadequate. According to Zang, Zang & Whitmer has handled between 1,420 and 1,650 personal injury cases since its formation in 1979. HT Vol. III (2d Sess.), at 32-36. Approximately twenty of those cases were referred to outside trial counsel and approximately nine actually proceed to trial. Bar Exhibits 73-75, 78; HT Vol. IV (1st Sess.), at 267; HT Vol. II (2d Sess.), at 223. We agree that "[a] practice which refers roughly one percent of all cases to trial counsel [in other firms] is simply too scarce to justify public claims that Zang [and] Whitmer are trial lawyers." State Bar's Opening Brief, at 24. Furthermore, even if respondents' referral practice adequately protected their clients' interests, it did not justify respondents' implicit claims that they would personally represent their clients in court. Indeed, respondents did not even inform new clients that their case would be referred to outside counsel if trial became necessary. CR, at 20-21.

Respondents' final argument is that their advertisements never actually harmed anyone. This argument, inherently difficult to prove or disprove, also is unpersuasive. Although there may be little specific evidence of consumer injury or dissatisfaction,[11] we think it self-evident that the message conveyed by respondents' advertisements was inherently misleading and potentially dangerous. *See Zauderer*, 471 U.S. at 652-53, 105 S.Ct. at 2283 (advertisement making no distinction between "legal fees" and "costs" is inherently misleading); *cf. In re Felmeister & Isaacs*, 104 N.J. 515, 518 A.2d 188 (1986) (television

advertisements by attorneys using drawings, animations, dramatization, music, or lyrics are inherently misleading; attorney advertising must be predominately informational).

Presumably, respondents included dramatic symbols of conflict—courtrooms, judges, confrontation, and oral argument to a jury—in their advertisements because they believed such symbols would attract clients. Those clients had a right to expect that their attorneys were prepared to take their cases to court and to try them to a judge or jury if necessary. CR, at 21. Not having been told that the firm lacked trial ability, and that it actually prepared cases for settlement, not litigation, a client may have accepted settlement recommendations without determining whether such recommendations were prompted, at least in part, by the firm's lack of in-house trial capacity.

Even if no client has yet been damaged, discipline is appropriate to protect consumers from misleading advertising. The rules governing attorneys are designed to prevent harm and protect consumers. *See Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 463-64, 98 S.Ct. 1912, 1922-23 (1978). Advertisements falsely suggesting a willingness and ability to do trial work necessarily create a danger that consumers will turn to respondents for help with matters that may need to be litigated. This danger alone is sufficient justification for enforcing DR 2-101(A) without requiring proof of actual harm in the past.

Our conclusion that respondents' advertisements were false and misleading should not be read too broadly. Although it seems unlikely that personal injury lawyers can achieve the best results for their clients without earning and maintaining a proven willingness and competence to take cases to trial when necessary, we do not criticize respondents' practice of settling most cases or of referring trial work to outside counsel. Respondents were not charged with providing incomplete or incompetent legal services, nor was evidence adduced on this point. Thus, it may be, as the evidence at the disciplinary hearing suggested, that respondents' use of computers, investigators, and medical knowledge secured a fair settlement for many of their clients. The same, perhaps, could be said of a competent firm of public adjusters. The fact remains, however, that respondents' adver-

tisements painted a false picture, portraying Zang and Whitmer as trial lawyers who prepared cases for trial, who were willing and able to try, and who actually tried, personal injury cases. That portrait was flattering past the point of deception. *See* DR 2-101(A).[12]

C. Directions for the Future

As our prior discussion indicates, we intend strict enforcement of the rule against false and misleading advertising. As a guide for the future, we take this opportunity to outline some principles that may prove helpful in determining whether a particular advertisement is false or misleading. Although the comments that follow pertain to our present rules and are truly dicta in an adjudicatory sense (we cannot fairly evaluate respondents' conduct by standards announced today), they should provide some future direction for the bar.

The Rules of Professional Conduct regulate various aspects of commercial advertisements about a lawyer and his or her services. *See* ER 7.1-7.5, Rule 42, Ariz.R.S.Ct., 17A A.R.S. The only truly substantive regulation, however, is ER 7.1's prohibition of "false or misleading communication[s] about the lawyer or the lawyer's services." According to ER 7.1, an advertisement is false or misleading if it misrepresents or omits a material fact, creates an unjustified expectation about the results a lawyer can achieve, or makes unsubstantiated comparisons of legal services.

Lawyers who choose to advertise should remember that they are professionals charged with an important public trust: preserving and protecting the public's commercial, civil, and constitutional rights. Advertising that informs consumers about their rights and about the availability and cost of legal services is a valuable method of increasing access to legal representation and of furthering the rule of law. This type of advertising is fully deserving of constitutional protection, and is apparently what the Supreme Court had in mind when it extended first amendment protection to lawyer advertising. *See, e.g., Bates, supra.*

We recognize, of course, that another primary purpose of advertising is to convince consumers to call a particular lawyer. While this focus is *not* objectionable standing alone, it often leads at-

torneys to stretch the truth or to focus on dramatic, "sophisticated" sales techniques that all too often provide little helpful information and consequently have a greater tendency to mislead consumers.[13] While no doubt effective in attracting clients, dramatic, nonfactual advertisements are more likely to misrepresent or omit material facts, or to create unjustified expectations about the results a lawyer can achieve than are advertisements that primarily convey factual information that will help consumers make rational decisions about whether to seek legal services.

Thus, attorneys attempting to produce advertisements that are neither false nor misleading should keep in mind that the sale and use of legal services is fundamentally different than the sale and use of ordinary consumer products. *See Felmeister & Isaacs*, 104 N.J. at _____, 518 A.2d at 199. It matters less which brand of beer or soap consumers choose than what kind of lawyer they choose. Legal representation may affect the consumer's basic rights and may have long-term consequences; consumers easily can discard a disappointing beer or bar of soap and try a different brand next time. Furthermore, consumers are less likely to be "taken in" by advertisements for consumer products than by advertisements for legal services. People usually have much more experience with consumer products than they have with legal services. Consequently, the Rules of Professional Conduct do not tolerate the same sort of sales pitch for legal services that the Federal Trade Commission tolerates for most consumer products.

The dramatic sales pitch is especially troublesome when it is broadcast on radio or television, which leave little time for reflection and rational deliberation. The Iowa and New Jersey Supreme Courts have responded to this potential danger by expanding their rules of professional conduct to require that television advertisements be "predominately informational." *Humphrey v. Committee on Professional Ethics & Conduct*, 377 N.W.2d 643 (Iowa 1985), *appeal dismissed for want of a substantial federal question*, _____U.S._____, 106 S.Ct. 1626 (1986); *Felmeister & Isaacs, supra*. Reasoning that dramatic television advertisements are inherently misleading, both courts have

severely limited the use of music, pictures, and dramatic presentations in television advertisements by attorneys. Although the Supreme Court has not reviewed either Iowa's or New Jersey's rules, its consistent refusal to explicitly extend its prior holdings to "the electronic broadcast media," *e.g. Bates*, 433 U.S. at 384, 97 S.Ct. at 2709, and its dismissal of the appeal in *Humphrey* for want of a substantial federal question, suggest that even such stringent rules may be constitutional.

Our own rules do not yet place any special restrictions on television or radio broadcasts, nor do we think it necessary to take that step today. Some music or drama may help convey the attorney's message. We believe, however, that lawyer advertising, particularly on the electronic media, should be predominately informational in nature. This is consistent with the rationale for extending first amendment protection to lawyer advertising and with the public's interest in access to and knowledge about lawyers and legal services.

Advertisements are likely to minimize the danger of violating ER 7.1 if they are designed to inform consumers of their rights and of the methods available to meet legal problems and crises; to inform the public of the availability and costs of services; or to convey accurate information relevant to making informed, rational choices of counsel, including information about counsel's availability and areas of practice. *See Felmeister & Isaacs*, 104 N.J. at _____, 518 A.2d at 192-93; *Humphrey*, 377 N.W.2d at 647. In the future, the bar should examine lawyers' advertisements to determine whether, taken as a whole, they are predominately informational or are simply emotional, irrational sales pitches. While the latter may not be prohibited by ER 7.1, they should be examined carefully to assure that they are neither false nor misleading.

III. REPRESENTATIONS OF SOCIETY MEMBERSHIPS

Zang also is charged with violating DR 2-101(A) and DR 1-102(A)(4) by claiming the status of "fellow" in the American Academy of Forensic Sciences (AAFS) and the American College of Legal Medicine (ACLM) after his membership in those

organizations had been terminated for failure to pay dues. The parties agree that Zang was once a fellow in the AAFS and the ACLM, that his membership in those organizations terminated in 1977 and 1978 respectively, and that Zang advertised his fellowships in numerous print advertisements and letters from 1980 through 1983. Zang thus concedes, as did his expert, Professor Thain, that his claim of fellowship status was "technically" false.

Before the Committee and the Commission, Zang argued that the letters and advertisements in question were published under the mistaken belief that he was still a dues-paying fellow in both the AAFS and ACLM. Neither the Committee nor the Commission believed Zang's explanation. CR, at 26-27; CO, at 18-19. Instead, they *unanimously* concluded that "Zang either knew or should have known, or had a duty to apprise himself of his status in each organization, at a time when he was actively producing, editing and reviewing advertisements which would be submitted to the public, and which were intended . . . to convey meaningful information to consumers of legal services." CR, at 27; CO, at 19. We agree that the evidence clearly and convincingly supports this conclusion. *Cf. Kersting*, 151 Ariz. at 172, 726 P.2d at 588 (committee findings that turn on credibility are entitled to great weight).

Zang wisely did not press his mistaken-belief argument before this court. Respondents' Brief, at 20-23. Instead, he contends that his claims of fellowship status were "immaterial." Because he maintained the training and education that allowed him to become a fellow in the first place, so the argument goes, consumers were not misled by his failure to disclose his lapse in dues. "Once an Eagle Scout, always an Eagle Scout." Respondents' Brief, at 22.

We are unpersuaded by this argument. Membership in professional societies implies not only the adequacy of past training but a continuing expertise, maintained, at least in part, by active participation in professional functions and education. We recognize, of course, that in many organizations one may maintain membership without active participation. It is undeniably true, however, that by surrendering or allowing his membership

to be revoked, Zang put himself in a position where he could not gain the benefits of continuing membership. We therefore disagree with the argument that Zang's misrepresentation of fellowship status was immaterial.

Further, we strongly disagree with the suggestion that the disciplinary rules prohibit only "material" violations that actually harm individual clients. The rules are designed to promote and maintain honesty and integrity. *See* DR 1-102. As the Commission correctly concluded, "It is no defense to the ethical violation of falsehood that . . . Zang had not lost" the skills required for initial membership. "The ethical violation lies in [Zang's] willful, knowing or reckless disregard of truth, when making representations to the public, without making any apparent effort to verify the accuracy or currency of [his] information." CR, at 27. Carried to its logical extreme, Zang's argument would allow even those who have never been fellows to claim that status if they could make a colorable argument that they have the skills necessary to become a fellow.

We hold that respondent Zang either knowingly or with reckless disregard of the truth falsely advertised his status as a fellow in the AAFS and in the ACLM. Whatever his qualifications, a lawyer may not knowingly claim membership in an organization to which he does not belong. *Cf.* DR 2-101(B)(13) (lawyer may advertise *membership* in professional societies).

IV. FAILURE TO SUBROGATE

A. Background

The Committee and the Commission found Zang guilty of unethical conduct for wrongfully settling a property damage claim with two insurers, thereby prejudicing the first insurer's subrogation rights. Zang allegedly violated DR 1-102(A)(4) and (6) and DR 7-102(A)(2), (3), and (7), which provide, respectively:

(A) A lawyer shall not:

* * *

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

* * *

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

(A) In his representation of a client, a lawyer shall not:

* * *

(2) Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.

(3) Conceal or knowingly fail to disclose that which he is required by law to reveal.

* * *

(7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.

This charge arises out of Zang's representation of Betty Daniels, who retained Zang after she was involved in an automobile accident on April 4, 1981. Zang obtained a settlement draft from State Farm Insurance Company, Daniels' insurer, in payment of medical bills and $1,400 in property damage. He also obtained a $3,900 settlement from Equitable General Insurance Company, the tortfeasor's insurer. The bar alleged that the settlement with Equitable included payment of Daniels's property damage claim, and that Zang refused to honor State Farm's subrogation claim even though he had accepted the Equitable settlement with knowledge that it covered that claim. Zang contended that the settlement with Equitable covered only bodily injury and that he therefore acted properly in refusing to honor State Farm's subrogation claim for the property damage.

The Committee and the Commission rejected Zang's testimony and found that Zang knowingly settled Daniels's property damage claim with Equitable after first having settled the same claim with State Farm. They found that Zang destroyed State Farm's subrogation rights by giving Equitable a release for payment of any and all claims, including "personal injuries and property damages. . . ." They also found that Zang then wrongfully

refused to honor State Farm's claim. CR, at 31-33, CO, at 28-31.

Zang objects to the findings of the Committee and the Commission on three grounds. According to Zang, "The evidence totally failed to establish (1) that Equitable made a property damage payment, (2) that if it did [he] knew the payment was for property damage, or (3) that State Farm was injured even if [he] did fail to inform it of the payment." Brief for Respondents, at 24 (numbering added). We examine each of these objections in turn.

B. Discussion

1. Did the Settlement with Equitable Include Property Damage?

Zang points to two pieces of evidence to support his theory that Equitable's payment did not include property damage. First, Equitable never requested title documents to Daniels's vehicle. This is important, Zang argues, because Equitable had stated in a previous letter that if it paid the property damage claim it would require title documents so that it could obtain the salvage value of Daniels's vehicle. Second, Equitable's settlement check was for a lump sum, and, according to Zang, it was designated "BI," for bodily injury.

Zang's first point is well-taken, but hardly dispositive. Equitable may have decided against obtaining the salvage value, or, more likely, may have failed to request the title documents through clerical or other error. Zang's second claim, that Equitable's check was designated to cover only "BI," is incorrect. In fact, the only notation on the check expressly states that the check was issued "in payment of any and all claims." Furthermore, on July 27, 1981, in exchange for the $3,900 payment, Zang and Daniels signed a waiver releasing Equitable from "any and all . . . personal injur[y] and property damage" claims. Zang did not explain why, if the settlement did not include property damage, neither he nor Equitable crossed out the reference to property damage in Equitable's form release.

Payment for property damage as part of Equitable's $3,900 settlement is further established by internal memoranda from State

Farm and Equitable. Several letters indicate State Farm's understanding that the Equitable payment included property damage, and phone memoranda from both State Farm and Equitable establish that Equitable communicated this fact to State Farm. These memoranda do not, of course, go to the question of Zang's knowledge, but coupled with the release and the any-and-all-claims designation on Equitable's check, they leave no doubt that Equitable thought its settlement included property damage.

2. Did Zang Know that Equitable's Settlement Included Property Damage?

The evidence summarized above also suggests that Zang knew Equitable's settlement included property damage. Zang had negotiated and participated in many similar settlements. It is difficult to believe that he both failed to understand the plain language of the check *and* negligently failed to modify that release.[14] Additional indirect evidence of guilty knowledge is provided by Zang's failure to respond to three letters from State Farm. Those letters requested reimbursement and charged Zang with unethical conduct. Although Zang was not obligated to respond to State Farm's accusatory letters, we believe that few attorneys would silently tolerate repeated attacks on their character if they had acted without knowledge that Equitable's settlement included property damage.

After reviewing the evidence, we find the conclusion reached by the Committee and by the Commission fully supported by the record: "Zang did know that he was settling more than just a bodily injury claim with Equitable[,] and . . . by tendering a full release of claims he knew that he was prejudicing State Farm's subrogation right." CR, at 33; CO, at 31. Again, we defer to the Committee and the Commission on questions of credibility. *Kersting, supra.* On the written record, we conclude that the charges were established by clear and convincing evidence.

3. Was State Farm Prejudiced or Injured?

Evidently conceding that the release he gave Equitable prejudiced State Farm's rights, Zang argues that his actions caused no damage because, fearing that its insured may have been con-

tributorily negligent, State Farm had decided not to pursue its subrogation rights. This argument is deeply flawed. State Farm never informed Zang that it might not pursue subrogation; Zang uncovered this information during discovery for this case. All the information that Zang received immediately before and after the Equitable settlement indicated that State Farm intended to claim subrogation rights. Consequently, State Farm's uncommunicated decision not to subrogate does not excuse Zang's unethical conduct. *See* CR, at 33.

Furthermore, even if State Farm had communicated a decision not to subrogate, at the very least Zang would have been under a duty to inform State Farm that he had obtained a property damage settlement from the adverse carrier. Surely, we are not expected to believe that Zang entertained the belief that, without consideration or reason, State Farm voluntarily would surrender its right to funds that it was entitled to receive under the provisions of its policy. Given Zang's own version of the facts, he was under an obligation to do more than simply pay his client a double recovery on her property damage claim without informing her insurer that there were funds available on its subrogation claim.

V. WRONGFUL ACCEPTANCE OF A MISTAKEN PAYMENT

A. Background

The Commission also found Zang in violation of DR 1-102(A)(4) and (6) and DR 7-102(A)(2) and (7), *see ante*, for wrongfully accepting settlement money he knew had been tendered in error. This charge arises out of Zang's representation of Rebecca Drummond in a claim for personal injuries.

Drummond was injured in a two-car automobile accident on January 12, 1981. Both Drummond and the driver of the other car, William Bryan, were insured by State Farm Insurance Company. Before Drummond retained Zang, State Farm offered her a $1,100 settlement for the property damage to her vehicle. State

Farm twice communicated the same offer to Zang, who apparently never sought a higher amount.

Because State Farm also insured Bryan, Zang's negotiations on the bodily injury portion of Drummond's claim were also with State Farm. Zang initially offered to settle Drummond's bodily injury claim for $8,000. Francene Adcock, the adjustor responsible for Drummond's file, responded with a $2,000 counteroffer. According to Adcock's log, Zang then dropped his offer to$3,500. Adcock responded by coming up to $3,000. A stalemate ensued.

Both parties tried different tactics to end the deadlock. On July 2, 1981, Zang notified Adcock that he had filed suit; he also raised his settlement demand to $6,000. On July 7, Adcock attempted to induce settlement by sending Zang a "drop draft" for $4,500, of which $3,400 covered bodily injury and $1,100 was for property damage. Adcock enclosed a release with the $4,500 draft.

Adcock made the mistaken payment at issue here while she was preparing her $4,500 offer. She reviewed Bryan's file, and, mistakenly thinking she was looking at Drummond's file, wrongly concluded that Drummond's policy included coverage for medical payments ("med-pay"). Acting on her mistaken belief, Adcock sent Zang a draft for $1,295.05 to cover Drummond's submitted medical bills. Adcock mailed the med-pay draft to Zang on July 6, one day before mailing the $4,500 settlement offer.

Zang thus came into possession of two drafts. The first draft, for $1,295.05, was paid on Drummond's own policy for medical expenses, even though her policy did not include medical coverage. The second draft, for $4,500, was paid on Bryan's policy and included $1,100 for property damage and $3,400 for bodily injury.

Although Zang had never claimed that Drummond was entitled to med-pay coverage, he combined the two drafts to form a $5,795.05 settlement pool. He testified that he initially advised Drummond to reject even this settlement. Eventually, however, Drummond accepted the settlement. Adcock discovered her error on July 28, 1981, and telephone Zang to return the $1,295.05

med-pay settlement. Zang refused to return the additional money, arguing that it had provided the necessary incentive to settle the case. Zang also rejected State Farm's later offer to return the release signed by Zang and Drummond and to renegotiate or litigate the bodily injury claim. Zang never notified Drummond of the error or revealed to State Farm that he had retained one-third of the mistaken payment as part of his contingent fee.

B. Discussion

The State Bar alleges that Zang presented the med-pay draft to his clients as part of the settlement and took a one-third contingent fee, all with knowledge that the med-pay draft had been tendered in error. Zang's defense before the Committee was that he did not know about the error. Neither the Committee nor the Commission believed him. CR, at 41-42; CO, at 36, 41-42.

The evidence demonstrates that before Zang endorsed the two checks and took his fee on July 23, 1981, he had agreed to settle Drummond's claim for *no more* that $5,100 ($4,000 for bodily injury and $1,100 for property damage). *See* CR, at 36-38 (finding that Zang offered to settle for $3,500). The disparity between this amount and the $5,795.05 he received from State Farm was sufficient to at least alert Zang to the possibility of an error by Adcock.

Zang disputes this conclusion. Relying on a July 2 letter stating that he "remain[ed] willing" to settle for $6,000 after filing suit, Zang claims that he never dropped his offer below $6,000. Once again, the Committee and the Commission did not believe Zang's testimony on this point. CR, at 38, 42; CO, at 39. The record supports their conclusion. First, Adcock testified in her deposition, recorded in her log, that Zang had offered to settle the bodily injury claim for $3,500 before he filed suit. Significantly, Adcock had no reason to lie in her deposition or to inaccurately record Zang's offer in her log. Second, Zang's July 2 letter was a computer-generated form; consequently, we attach little significance to its use of the term "remain." Third, a July 27 letter from Adcock to Zang reflects Adcock's continued understanding that before filing suit Zang had offered to settle for $3,500, and that Zang had dropped his $6,000 post-filing offer to $4,000.

That letter rejects Zang's offer to settle the case for an "additional $500" in consideration for Zang having filed suit. The "additional $500" must be in reference to either Zang's $4,000 offer or to Adcock's $4,500 drop draft. If it was in reference to the $5,795.05 that Zang already had received from State Farm, it would have created a settlement pool *even larger* than the $6,000 Zang claims he requested. *See* CO, at 39.

The disparity between the settlement pool created by combining the two drafts and Zang's prior offers is not the only evidence establishing that Zang must have known the $1,295.05 draft was for med-pay. The face of the med-pay draft clearly identified Drummond's husband as the insured, thus indicating that the payment was for first-party coverage, rather than third-party coverage under Bryan's policy. The draft was payable only to the Drummonds, not to Zang. Furthermore, the med-pay draft was for the unusual amount of $1,295.05 and was accompanied by a medical payments transmittal form that broke down the amount of the draft by the sums owed to various doctors. The form instructed Zang to disburse the proceeds to the medical providers. In contrast, the $4,500 settlement draft identified Bryan as the insured and was payable to both the Drummonds and Zang. It also was accompanied by a release waiving any claims against Bryan for the "sole consideration of $4,500."

In the face of this evidence, we have no doubt that Zang knew an error had occurred. Zang's testimony before the Committee was internally inconsistent, *see* CR, at 42-43, and was contradicted by overwhelming evidence. Zang's assertion that the $1,295.05 draft was simply "another dirty trick" by Adcock does not excuse his conduct. CR, at 42. Zang's decision "[t]o unhesitatingly and unquestioningly" accept and disburse a settlement larger than he had sought, "creates an impression of the professional attorney as one who can and will take advantage of other persons' errors at all costs. . . ." CR, at 43. Even if Zang initially was unaware of the error, his refusal to take any action after State Farm informed him of its mistake was inexcusable. Zang's refusal to inform his client of the mistaken payment or to return the portion of his fee that was based on the erroneous payment violated DR 1-201(A)(4).

In our view, the evidence clearly and convincingly demonstrates that Zang knew the $1,295.05 had been tendered in error. Zang acted dishonestly when he disbursed the med-pay draft to his clients and took a one-third contingent fee.

VI. EXCESSIVE FEES

A. Background

The last charge also arises out of Zang's representation of Rebecca Drummond. The Committee and the Commission found that it was improper and unethical for Zang to take a one-third contingent fee out of Drummond's property damage settlement and out of the med-pay money sent to Drummond in error. Zang's actions were allegedly in violation of DR 2-106, which provides in pertinent part:

(A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

(B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

(3) The fee customarily charged in the locality for similar legal services.

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or by the circumstances.

(6) The nature and length of the professional relationship with the client.

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

(8) Whether the fee is fixed or contingent.

B. Discussion

The conclusion that Zang & Whitmer collected an excessive fee in the Drummond case follows inescapably from one simple fact: Zang & Whitmer did nothing to earn a fee from either the med-pay or property damage settlements. For the reasons explained in section V, Zang must have known that Adcock's draft was for med-pay and that it had been tendered in error. Zang knew that Drummond did not have med-pay coverage and that he had expended no effort to obtain the med-pay benefits. Consequently, Zang was not entitled to a one-third contingency for "collecting" $1,295.05 in med-pay coverage.

The record also demonstrates that Zang did nothing to justify taking a one-third fee for collecting Drummond's property damage settlement. State Farm had offered Drummond $1,100 on her property damage claim before Zang even entered the case. Zang did not dispute this fact, nor does he claim that Drummond eventually received more than $1,100 for her property damage claim. Instead, Zang argues that he earned his fee by fighting to obtain the $1,100 after Adcock wrongfully withheld it in an attempt to force settlement of the bodily injury claim.

Once again, Zang's testimony is unsupported by the record. State Farm notified Zang of its outstanding $1,100 offer on Drummond's property damage claim on February 9 and on March 30, 1981. The March 30 reminder was in the form of a "claim-gram." It explicitly invited acceptance of State Farm's offer to pay property damage and provided a blank space for Zang's reply. Zang needed only to write his acceptance in the space provided and return the "claim-gram" to State Farm. He never did so. Adcock's log, State Farm's file, and even Zang's file contain *no* evidence that Zang ever attempted to accept State Farm's offer. In these circumstances, Zang should not have taken one-third of Drummond's recovery as his fee.

VII. DISCIPLINE TO BE IMPOSED

Respondents Zang and Whitmer violated DR 2-101(A) by engaging in false and misleading advertising. In addition, respondent Zang violated various disciplinary rules by falsely representing himself as a fellow in two professional societies, by failing

to honor a subrogation right, by knowingly accepting money tendered to his client in error, and by charging and collecting an excessive fee. The Disciplinary Commission recommended that Zang be suspended for one year and that Whitmer be suspended for ninety days. We turn now to the appropriate discipline.

A. Restitution

We have concluded that Zang accepted the sum of $1,295 paid by State Farm in error. *See* section V, *ante*. We also have found that Zang charged an excessive fee to Mrs. Drummond by charging her a contingent fee of one-third on the property damage payment made by State Farm. This fee amounts to $363. The Disciplinary Commission recommended that restitution be required. We think this recommendation is eminently proper. Respondents have not challenged the court's power to require restitution under our former rules. *Cf. In re Beckmann*, 79 N.J. 402, 400 A. 2d 792 (1979). It is ordered, therefore, that as a condition of reinstatement Zang and Whitmer, as shareholders of Zang & Whitmer, Chtd., make restitution to Mrs. Drummond in the amount of $363. Respondents are ordered to pay interest on this sum at the rate of ten percent per annum from the date Zang & Whitmer first received the improper payment. In framing the order in these terms, we evince our agreement with the Commission's determination that Whitmer's participation in establishing the firm's fee arrangements was sufficient to justify his participation in the ordered restitution. CR, at 48-49. Respondent Zang also is ordered to make restitution to State Farm in the amount of $1,295.05, with interest at ten percent per annum from the date Zang and Whitmer, Chtd., received the improper payment.

B. Suspension

1. False and Misleading Advertising

The Commission recommended a ninety-day suspension for each of the respondents on the charges of false and misleading advertising. In weighing that recommendation, and in determining the proper sanctions to be imposed for the advertising viola-

tions, we are mindful that no actual harm to the public was proved. It is our intuitive sense that the type of false and misleading advertising at issue here is likely to damage the public. Our experience leads us to conclude that those who advertise for a high volume, fast turnover litigation clientele, but who have little or no experience or competency in actually trying cases, may do a great deal of damage. First, such practitioners may lack the experience necessary for a proper evaluation of their clients' claims. Next, they may lack the standing and reputation with adverse counsel or insurers that would enable them to realize the full value of their clients' cases in settlement negotiations. Finally, because they lack trial ability, they may be tempted to settle cases that should be tried or, at the very least, to settle them early when settlement at or during trial might produce better results. We do not accept the apocryphal adage that "any settlement is better than trial." Good settlements or reasonable settlements may be better than trial, but one who holds himself out as a specialist in handling cases whose ultimate value can only be determined by trial, ought either to have trial ability or to inform his clients that he lacks it.

These thoughts, however, are products of experience and intuition, and cannot substitute for evidence. The State Bar did not attempt to prove any case in which respondents settled a claim for significantly less than the value which would have been realized by attorneys who properly hold themselves out as specialists in personal injury litigation. Lacking such evidence, and in the absence of any client complaint, we must assume that no harm was done to any client. The record also fails to establish that respondents intended to harm their clients or acted with the knowledge that their conduct would result in harm. We also note that this is a case of first impression. No Arizona lawyers have been disciplined since display and television advertising first were permitted. All of these factors militate in favor of discipline by censure rather than by suspension.

Censure, however, may not be sufficient to deter others in the future. We wish to stress that lawyers will not be permitted to knowingly engage in false advertising or to destroy the ideals of the profession by attempting to snare clients as if they were sell-

ing soap rather than providing legal services. Balancing these considerations, we deem it appropriate to suspend each of the respondents for thirty days for engaging in false and misleading advertising.

We believe that given the serious dislocation of their practice, the significant amount of costs that will be charged against them, *see* section VIII, *post*, and the time expended on this case, a thirty-day suspension is sufficient both to ensure that there will be no repetition by respondents and to deter future misconduct by others. Hopefully, there will not be a next time, but if there is, it will not be a case of first impression.

2. Representations of Society Memberships

The Commission recommended that Zang be suspended for ninety days, the suspension to run concurrent with other discipline imposed in this case, for falsely claiming fellowship status in the AAFS and the ACLM. Zang argues that a ninety-day suspension is unwarranted because he (1) did not willfully misrepresent his fellowship status, and (2) used his best efforts to delete any reference to the fellowships after learning that his memberships had been terminated.

Once again, if the record supported Zang's version of the facts, we might find his argument persuasive. As the Committee and the Commission both concluded, however, at best the record demonstrates that Zang acted with reckless disregard for the accuracy of his claims; at worst, the record demonstrates that he acted willfully, with full knowledge that his memberships had lapsed and that his fellowships had been terminated. CR, at 26-27; CO, at 18-19. Like the Committee and the Commission, we find Zang's testimony regarding these charges inconsistent and unpersuasive. Zang's claim that he used his best efforts to eliminate all references to his fellowships, for example, is undercut by the record. Bar Exhibit 86 establishes that Zang & Whitmer mailed nine letters that included claims of fellowship status after Zang had been notified that his fellowship status had been terminated. Zang personally signed three of those letters. *See* HT Vol. V (2d Sess.), at 88-96.

We approve the Commission's recommendation that Zang be

suspended for ninety days. The suspension will run concurrently with other discipline imposed in this case.

3. Failure to Subrogate

Zang violated DR 1-102(A)(4) and (6) and DR 7-102(A)(2), (3) and (7) by knowingly "assist[ing Ms. Daniels] in collecting twice for the same property damage," and by "refus[ing], on behalf of his client, to entertain any effort to reimburse State Farm. . . ." CR, at 33. The purposeful nature of Zang's actions warrants the ninety-day suspension recommendation by the Commission. CR, at 34. This ninety-day suspension will run concurrently with other discipline imposed in this case.

4. Wrongful Acceptance of a Mistaken Payment

Zang's decision to accept and disburse money he must have known had been tendered in error, and to take a fee for his "efforts," is precisely the type of dishonest, fraudulent conduct proscribed by DR 1-201(A)(4). His dishonest conduct reflects adversely on his fitness to practice law, DR 1-102(A)(6), and was in violation of DR 7-102(A)(2) and (7). The Commission recommended that Zang be suspended for one year on this charge.

A majority of this court believes that the recommended discipline is appropriate. In part, they base this conclusion on Zang's lack of candor at the Committee hearing. Lack of candor is a recognized factor in determining the nature of discipline to be imposed. American Bar Association, Standards for Imposing Lawyer Sanctions, Rules 9.1 and 9.2 (1986). The court therefore imposes a suspension of one year, to run concurrently with all other suspensions imposed in this case. The writer and Justice Holohan favor a lesser discipline.[15]

5. Excessive Fees

Zang's fee in the Drummond case clearly was excessive under the standards set out in DR 2-106. *See* section VI, *ante*. The Commission recommended that Zang be suspended for ninety days. We do not believe that a ninety-day suspension is warranted for charging a fee excessive by $363. However, some suspension is certainly warranted, considering the nature of the impropriety.

We therefore impose a suspension of thirty days, to run concurrently with all other suspensions imposed in this case.

VIII. CONCLUSION

We hold that respondents received a fair hearing before an impartial tribunal. In our view, the due process standards articulated in *Withrow* and *Davis* were satisfied in this case. Even if they were not satisfied, however, any violation was cured by the de novo review conducted by the Commission and this court.

For the reasons discussed in this opinion, Stephen M. Zang is suspended from the practice of law for one year, commencing on the date of the mandate in this case. As a condition of reinstatement, he is required to make restitution to State Farm and to Rebecca Drummond as specified in section VII-A. Pursuant to former Rule 37(g), Mr. Zang is ordered to pay the State Bar of Arizona $15,441.06 for costs and expenses incurred in prosecuting this action.

C. Peter Whitmer is suspended for thirty days, commencing on the date of the mandate in this case, for engaging in false and misleading advertising. *See* section II, *ante*. As a condition of reinstatement, he is ordered to make restitution to Rebecca Drummond as provided in section VII-A. Pursuant to former Rule 37(g), Mr. Whitmer is ordered to pay the State Bar $11,166.97 for costs and expenses.

/s/ STANLEY G. FELDMAN, Vice Chief Justice
STANLEY G. FELDMAN, Vice Chief Justice

CONCURRING:

/s/ FRANK X. GORDON, JR., Chief Justice
FRANK X. GORDON, JR., Chief Justice

/s/ JAMES DUKE CAMERON, Justice
JAMES DUKE CAMERON, Justice

/s/ WILLIAM A. HOLOHAN, Justice
WILLIAM A. HOLOHAN, Justice

/s/ JACK D. H. HAYS, Justice (retired)
JACK D. H. HAYS, Justice (retired)

Justice James Moeller did not participate in the determination of this matter.

Justice Jack D. H. Hays (retired) was called back to active duty pursuant to Ariz. Const. art. 6, §20.

Footnotes

1. Because a probable cause determination was made in this case before February 1, 1985, the procedural aspects of this case are governed by our former rules, which were amended on September 7, 1984. *See* Order Deleting Rules 27 Through 49, Of The Supreme Court, And Substituting Amended Rules 27 Through 121, Rules Of The Supreme Court, In Their Place, 139 Ariz. LXXIX. The former rules will be cited as former Rule _____throughout this opinion.

2. Pursuant to the Order cited in note 1, the substantive aspects of this case are governed by the Code of Professional Responsibility, former Rule 29(a), instead of the current Rules of Professional Conduct, Rule 42, Ariz.R.S.Ct., 17A A.R.S. (Supp. 1986).

3. Whitmer was not charged in relation to this count.

4. The charges against Whitmer on the last three counts were dismissed by either the Committee of the Commission. Thus, Whitmer is directly involved only in the charge of false and misleading advertising.

5. In Arizona, relief formerly obtained by writs of prohibition, mandamus or certiorari is now obtained by "special action." Rule 1, Ariz.R.P.Sp.Act., 17A A.R.S.

6. We are not limited to Mr. Hendrick's affidavit in ascertaining the details of the contacts between the Committee and bar counsel. Following oral argument before this court, we suspended the proceedings to allow Zang and Whitmer to conduct discovery into the contacts that took place between bar counsel and the Committee after charges had been filed.

7. We also reject respondents' suggestion that this disciplinary proceeding is improper because it was not prompted by client complaints. Nothing in the record supports respondents' repeated assertions that the complaints against them represent nothing more than harassment by competitors and disgruntled employees. The State Bar received a large number of complaints regarding respondents' advertising and other business practices and acted properly in investigating those complaints. The absence of client complaints does not restrict our authority to impose discipline if ethical violations are established by clear and convincing evidence.

8. The advertisements did not identify the person arguing to the jury as Mr. Zang. Our decision in this case would be the same if an actor had played Zang's part.

9. Commercial advertising that is truthful and not misleading also may be

regulated. But such regulations must be the least restrictive means of directly serving a substantial state interest. *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 100 S.Ct. 2343 (1980). Because only false and misleading advertising is alleged here, we do not explore the possibility of regulating truthful advertising.

10. Professor Thain's testimony also is counterintuitive. As Professor Thain conceded on cross-examination, respondents' advertisements are obviously more likely to convey the impression that Zang & Whitmer does trial work than are advertisements which contain no reference to courts, juries, or trials.

11. There was some testimony suggesting that respondents' reputation of never taking cases to trial resulted in lower settlements for their clients. However, the Commission found the evidence insufficient to establish that respondents' failed to adequately protect their clients' interests. CR, at 21.

12. Having found that respondents violated DR 2-101(A), we need not decide whether they also violated DR 1-102(A)(4).

13. Consider, for example, the following excerpt from an article by a producer of television advertisements for lawyers:

> I have developed the following list of major "don'ts" for the lawyer who wishes to advertise profitably on television. This list will not guarantee that you'll make a fortune. But it will keep you on a safe path in the TV market as it is. Not how it might be. Or should be. Or could be. But how it *is*. And the list should spare you from becoming . . . a target of your ethics committee.
>
> The cardinal rule of lawyer advertising is to never forget that the successful commercial is a sales pitch. Not an announcement. Not a lesson in the law . . . It must contain all the elements of any successful sales pitch: attention, interest, desire, conviction and a close (in which you ask the viewer to call).

Landauer, *Dos and Don'ts for Television Commercials*, The National Law Journal, May 25, 1987, at 19.

14. Zang's claim that he failed to carefully examine the check and the release is particularly suspect because he was on notice before he accepted settlements from either State Farm or Equitable that Sate Farm desired to subrogate. In this situation, it was incumbent upon Zang to assure himself that he was not prejudicing State Farm's rights by releasing Equitable from any and all property damage claims. *See* CR, at 33.

15. Given the administrative difficulty of reinstatement resulting from suspension for a period in excess of six months (*see* former Rule 41(a) through (k), and present Rule 71, especially subsections (c) and (g)), Justice Holohan and I believe this recommendation somewhat harsh. The impropriety of Zang's acceptance of sums paid by mistake is not significantly different in quality from his refusal to honor State Farm's subrogation claim in the Daniels case. While the purposeful nature of Zang's actions in both cases warrants suspension rather than censure, we do believe it warrants suspension for any longer period.

However, we do believe that discipline imposed on two unrelated actions of dishonest or fraudulent conduct should be imposed consecutively. We, therefore, would suspend Zang for ninety days for wrongfully accepting funds tendered in error and order that this suspension run consecutively with all other discipline imposed in this case.

APPENDIX B

DECISION OF THE DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ARIZONA

Issued on February 4, 1986

Before the Disciplinary Commission of the

Supreme Court of Arizona

In the Matter of	)	
	)	Admin. Matter Nos. 82-1-S25
	)	82-7-S25
STEPHEN M. ZANG and	)	82-8-S25
C. PETER WHITMER,	)	82-9-S25
	)	82-12-S25
Members of the State Bar	)	82-13-S25
of Arizona,	)	82-14-S25
	)	83-1-S25
Respondents.	)	83-2-S25
	)	83-3-S25

NOTICE

The Disciplinary Commission having filed its report and order in the above matter; and

Copies of that report and order, being attached hereto,

You are hereby notified that pursuant to the provisions of 17A A.R.S. Sup. Ct. Rules, rule 36(d) (deleted 1985), you have ten (10) days from the date of service of this report upon you to file with the commission your objections to the recommendation.

DATED this 4th day of February, 1986.

/s/ Rosemary B. Martin, Disciplinary Clerk
Rosemary B. Martin, Disciplinary Clerk

Before the Disciplinary Commission of the

Supreme Court of Arizona

In the Matter of	)	
	)	Admin. Matter Nos. 82-1-S25
	)	82-7-S25
STEPHEN M. ZANG and	)	82-8-S25
C. PETER WHITMER,	)	82-9-S25
	)	82-12-S25
Members of the State Bar	)	82-13-S25
of Arizona,	)	82-14-S25
	)	83-1-S25
Respondents.	)	83-2-S25
	)	83-3-S25

ORDER UPON DECISION

Special Administrative Committee S-25 having filed its order and opinion recommending various sanctions against Stephen M. Zang and C. Peter Whitmer, including suspension from the practice of law, the Commission having this day filed its Report in the captioned matter, and pursuant to Ariz. R. Sup. Ct. 36(d) (deleted 1985); *see* Ariz. R. Sup. Ct. 53(d)(2),

IT IS ORDERED:

1. Respondents' motion to dismiss the proceedings for general denial of due process is hereby denied for the reasons stated in the Commission Report.

2. Respondents' motion to dismiss Count Eleven of the Third Amended Complaint for denial of due process is hereby denied for the reasons stated in the Commission Report.

3. The charge against Respondents described in the Commission Report as Bar No. 82-1(D)-S25 and contained in Count Eight of the original complaint dated December 14, 1982 is hereby dismissed on the merits, for the reasons stated by Special Administrative Committee S-25 in the record of this action.

4. The charge against Respondents described in the Commission Report as Bar No. 82-9-S25 and contained in Count Ten of the original complaint dated December 14, 1982 is hereby dismissed on the merits, for the reasons stated by Special Administrative Committee S-25 in the record of this action.

5. As to Count One of the Third Amended Complaint, the Commission hereby adopts the findings, conclusions and recommendations of Committee S-25, as amended as follows:

Findings of Fact

A. The Third Amended Complaint alleges that Respondents made no application to the State Bar of Arizona ("Bar" or "State Bar") to expand their advertising to include photographs, and that photographs are not included in those items authorized by DR 2-101(B). The Respondents are charged with violating DR 2-101(B) and (C), which provide:

(B) In order to facilitate the process of informed selection of a lawyer by potential consumers of legal services, a lawyer may publish or broadcast the following information in print media distributed or over television or radio broadcast in the geographic area or areas in which the lawyer resides or maintains offices or in which a significant part of the lawyer's clientele resides, provided that the information disclosed by the lawyer in such publication or broadcast complies with DR 2-101(A), and is presented in a dignified manner:

(1) Name, including name of law firm and names of professional associates; addresses and telephone numbers;

(2) One or more fields of law in which the lawyer or law firm practices, a statement that practice is limited to one or more fields of law, or a statement that the lawyer or law firm specializes in a particular field of law practice, to the extent authorized under DR 2-105;

(3) Date and place of birth;

(4) Date and place of admission to the bar of state and federal courts;

(5) Schools attended, with dates of graduation, degrees and other scholastic distinctions;
(6) Public or quasi-public offices;
(7) Military service;
(8) Legal authorships;
(9) Legal teaching positions;
(10) Memberships, offices, and committee assignments, in bar associations;
(11) Membership and offices in legal fraternities and legal societies;
(12) Technical and professional licenses;
(13) Memberships in scientific, technical and professional associations and societies;
(14) Foreign language ability;
(15) Names and addresses of bank references;
(16) With their written consent, names of clients regularly represented;
(17) Prepaid or group legal services programs in which the lawyer participates;
(18) Whether credit cards or other credit arrangements are accepted;
(19) Office and telephone answering service hours;
(20) Fee for an initial consultation;
(21) Availability upon request of a written schedule of fees and/or an estimate of the fee to be charged for specific services;
(22) Contingent fee rates subject to DR 2-106(C), provided that the statement discloses whether percentages are computed before or after deduction of costs;
(23) Range of fees for services, provided that the statement discloses, in print size equivalent to the largest print used in setting forth the fee information, that the specific fee within the range which will be charged will vary depending upon the particular matter to be handled for each client and that the client is entitled without obligation to an estimate of the fee within the range likely to be charged;

(24) Hourly rate, provided that the statement discloses, in print size at least equivalent to the largest print used in setting forth the fee information, that the total fee charged will depend upon the number of hours which must be devoted to the particular matter to be handled for each client and that the client is entitled without obligation to an estimate of the fee likely to be charged;

(25) Fixed fees for specific legal services, the description of which would not be misunderstood or be deceptive, provided that the statement discloses, in print size at least equivalent to the largest print used in setting forth the fee information, that the quoted fee will be available only to clients whose matters fall into the services described and that the client is entitled without obligation to an estimate of the fee likely to be charged.

(C) Any person desiring to expand the information authorized for disclosure in DR 2-101(B), or to provide for its dissemination through other forums may apply to the Committee on Rules of Professional Conduct of the State Bar of Arizona. Said Committee shall consider whether the proposal is necessary in light of the existing provisions of the Code, accords with standards of accuracy, reliability and truthfulness, and would facilitate the process of informed selection of lawyers by potential consumers of legal services; and following its consideration shall forward its recommendation to the Arizona Supreme Court. The relief granted in response to any such application shall be promulgated as an amendment to DR 2-101(B), universally applicable to all lawyers.

B. While it is true that photographs are not expressly provided as an acceptable method of advertising, the evidence established that the intention of the State Bar of Arizona was to authorize the use of photographs in print advertisements. In view of the intent and established practice relating to photographs, the Committee recommends an amendment to the rule to expressly allow the use of photographs. The rule expressly permits television

advertising, which impliedly includes pictoral representations. Gary Stuart, Chairman of the State Bar Committee on Rules of Professional Conduct, and one of the draftsmen of the rule, testified that the rule was intended to permit the use of photographs, and that the use of photographs, *per se*, was not intended to constitute an ethical violation. No evidence was presented to indicate that Respondents willfully violated the rule, or were acting in disregard of an ethical restriction clearly understood by others in the profession to be different than the interpretation placed upon the rule by Respondents and the drafters.

Conclusion of Law

Therefore, with respect to Count One, the Commission concludes there was no ethical violation of the proscriptions of DR 2-101(B) and (C). Count One is hereby dismissed on the merits as to both Respondents Zang and Whitmer.

6. As to Count Two of the Third Amended Complaint, the Commission hereby rejects the findings, conclusions and recommendation of Committee S-25 for the reasons stated in the Commission Report. Count Two is hereby dismissed on the merits as to both Respondents Zang and Whitmer.

7. As to Count Three of the Third Amended Complaint, the Commission hereby affirms and adopts the findings, conclusions and recommendation of Committee S-25, as amended in the Commission Report.

8. Pursuant to Ariz. R. Sup. Ct. 56 and the inherent authority of the Commission, the Disciplinary Commission hereby approves and adopts that certain consent agreement in the captioned matter dated June 30, 1984 and adopted and accepted by Special Administrative Committee S-25 by its order dated July 20, 1984, which consent agreement the Commission treats as an imposition of probation upon both Respondents Zang and Whitmer pursuant to Ariz. R. Sup. Ct. 52(a)(6) under Counts Four, Five and Seven of the Third Amended Complaint.

9. As to Count Six of the Third Amended Complaint, the Commission hereby affirms and adopts the findings, conclusions and recommendation of Committee S-25, as amended as follows:

Allegations

The Bar has charged Respondents with knowingly signing a settlement check of Lucien Smith, a deceased client, using a power of attorney which by law had expired upon the client's death. *See, Ariz. Rev. Stat.* §14-5502 (1975). That act allegedly was in willful disregard of estate and probate settlement laws and procedures. The disciplinary rules which Respondents have allegedly violated are:

DR 1-102(A)(1), (4) and (6), which state:

(A) A lawyer shall not:

(1) Violate a Disiplinary Rule.

* * *

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

* * *

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

and DR 7-102(A)(8):

(A) In his representation of a client, a lawyer shall not:

* * *

(8) Knowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule.

Findings of Fact

A. Lucien Smith was injured in an automobile accident, and hired Zang and Whitmer to represent him. From time to time, while negotiations proceeded on the claim, Mr. Smith would drop in to Resondents' law office, and engage Respondent Zang in conversations. During those conversations, he advised Zang of an unrelated cancerous condition and its status.

B. On April 27, 1981, Smith was hospitalized for cancer treatment. At that time, no settlement had been reached on behalf of Mr. Smith. Upon learning of the hospitalization, Zang caused a power of attorney to be drafted and sent to Mr. Smith in the hospital. On May 4, 1981, this power of attorney was executed by Mr. Smith, and authorized the firm of Zang and Whitmer to settle the matter and also to sign settlement drafts.

C. Mr. Smith died on May 13, 1981, and three days later Zang

and Whitmer received a settlement draft from the insurance company which had been prepared on May 12, 1981, one day before Mr. Smith's death. It is clear that the settlement agreement and amount of the settlement had been reached prior to the death of Mr. Smith, and was therefore binding upon the parties.

D. On May 14, 1981, Kathy Johnson, daughter of Lucien Smith, who had taken on the task of monitoring the case and communicating with the law firm on behalf of the family, called the firm. She recalled that she was emotionally strained and upset at the time, and that she left word that her father had died.

E. Esther Adams testified that Zang told her to instruct the daughter, Kathy Johnson, to notice of her father's death, if it occurred, by indirect means (in the form of a "code") which would not specifically state that he had died. Mrs. Johnson did not recall whether she spoke specifically with an attorney of the firm or not. Esther Adams, a paralegal employed by the firm, testified that when Kathy Johnson called she was crying and upset, and that Adams assumed that the father had died and then transferred the call to Mr. Zang. She did not hear the conversation between Kathy Johnson and Mr. Zang.

F. Esther Adams further restified that after she received the phone call from Kathy Johnson, which she interpreted as as notice to her that Smith had died, she later discussed the case with Mr. Zang. According to Adams, he said that they had "just gotten in under the wire."

G. Mr. Zang testified that he did not know that Lucien Smith had died on the date of the phone call of May 14, 1981, nor did he know that Lucien Smith had died even as late as May 19, 1981. There is no direct evidence which indicates that Zang had actual knowledge of the death as late as May 19, whether by "code" or other statement.

H. Mr. Zang testified that he did not know that the power of attorney which had been executed would expire upon Mr. Smith's death, but that he assumed that he was using the form in his office which allowed for a power of attorney which continued after death, in any event.

I. On or about May 16, 1981, Zang & Whitmer received the

May 12 settlement draft. It was made payable to both Lucien and Beryl Smith, and the firm. Esther Adams' log reflects that Mr. Zang told her to contact "Mr. and Mrs. Smith" in order to come in and receive the settlement proceeds.

J. Smith's widow, Beryl, visited the law offices of Zang and Whitmer on May 19, 1981, in order to receive the settlement distribution. She was crying and discussed the death and funeral with Esther Adams. There is no evidence that Mrs. Smith met with any attorney on that date.

K. Esther Adams also testified that prior to the settlement draft being endorsed, by use of the power of attorney, she had discussed the funeral with Stephen Zang. Mr. Zang endorsed the back of the insurance draft, and Peter Whitmer endorsed on behalf of Mr. Smith by means of the special power of attorney on May 19. Zang and Whitmer executed its check, payable to Beryl Smith only, from the firm's trust account, without designating Lucien Smith as a payee. No one disputes that the settlement proceeds were distributed in accordance with the law, and that no injury has occurred to any third party.

Conclusions of Law

(1) The settlement on behalf of Lucien Smith was agreed to and the case actually settled before Mr. Smith's death. It was done with a power of attorney and done with Mr. Smith's consent. He was concerned about obtaining a settlement before he died so that his wife could purchase a mobile home from the proceeds.

(2) From all of the circumstances, we are not convinced by the force of the evidence and with the recollection of memories that there is clear and convincing evidence to prove knowledge of Smith's death by Respondent Zang. Thus, we cannot find that Mr. Zang knew that Lucien Smith was dead at the time that he executed the settlement draft, and caused the power of attorney to be signed by Mr. Whitmer, and a trust check to be issued to Beryl Smith.

(3) Since the Commission is charged with a higher duty than to base its findings on mere suspicion or speculation, we therefore find that no ethical violations occurred with respect to the Lucien Smith matter.

Decision

Count Six is hereby dismissed on the merits as to both Respondents Zang and Whitmer.

10. As to Counts Eight and Nine of the Third Amended Complaint, the Commission hereby affirms and adopts the findings, conclusions and recommendation of Committee S-25, as amended in the Commission Report.

11. As to Count Ten of the Third Amended Complaint, the Commission hereby affirms and adopts the findings, conclusions and recommendation of Committee S-25, as amended in the Commission Report. Count Ten is hereby dismissed on the merits as to Respondent Whitmer only.

12. As to the portion of Count Eleven of the Third Amended Complaint relating to the client Betty Daniels, the Commission hereby rejects the findings, conclusions and recommendation of Committee S-25, for the reasons stated in the Commission Report, and the same is hereby dismissed on the merits.

13. As to the portion of Count Eleven of the Third Amended Complaint relating to the client Rebecca Drummond, the Commission hereby affirms and adopts the findings, conclusions and recommendation of Committee S-25, as amended in the Commission Report. That portion of Count Eleven is hereby dismissed on the merits as to Respondent Whitmer in his personal capacity only.

14. As a result of the foregoing orders, the Commission hereby imposes or recommends discipline as follows:

Count	Respondent Zang	Respondent Whitmer
One	Dismissed	Dismissed
Two	Dismissed	Dismissed
Three	Suspension: 90 days	Suspension: 90 days
Four	Probation	Probation
Five	Probation	Probation
Six	Dismissed	Dismissed
Seven	Probation	Probation

Eight	Suspension: 90 days	No charge
Nine	Suspension: 90 days	Dismissed
Ten	Suspension: 1 year	Dismissed
Eleven (Daniels)	Dismissed	Dismissed
Eleven (Drummond)	Suspension: 90 days	Dismissed*

*Except to the extent that restitution is recommended.

15. This order and all matters relating to charges dismissed, disposed of by probation, or otherwise disposed of by a recommendation less severe than disbarment, suspension or censure, shall be sealed and remain confidential, to be opened only upon an order of the Supreme Court of Arizona or this Commission.

16. The Disciplinary Clerk shall file the record on appeal in this matter with the Supreme Court of Arizona pursuant to Rule 53(e)(1), Rules of the Supreme Court of Arizona.

17. The Disciplinary Clerk shall prepare and submit to the Supreme Court a statement of costs and expenses incurred in these proceedings together with a request to assess those costs and expenses against the respondent, pursuant to Rule 53(e)(3).

DONE AT PHOENIX, ARIZONA on January 20th, 1986.

/s/ Henry R. Paytas, Chairman
Henry R. Paytas, Chairman

Before the Disciplinary Commission of the

Supreme Court of Arizona

In the Matter of	)	
	)	Admin. Matter Nos. 82-1-S25
	)	82-7-S25
STEPHEN M. ZANG and	)	82-8-S25
C. PETER WHITMER,	)	82-9-S25
	)	82-12-S25
Members of the State Bar	)	82-13-S25
of Arizona,	)	82-14-S25
	)	83-1-S25
Respondents.	)	83-2-S25
	)	83-3-S25

COMMISSION REPORT

The captioned matter came on for hearing before the Disciplinary Commission on Saturday, May 11, 1985. The record on appeal having been reviewed, the issues having been duly heard, and a decision duly rendered, the Commission reports[1] as follows:

I
INTRODUCTION

The Respondents, Steven M. Zang ("Zang") and C. Peter Whitmer ("Whitmer"), were initially charged by formal complaint with ten counts of ethical violations, comprising seven original charges screened and investigated by the State Bar. Various amendments and deletions to the pleadings were made before Special Administrative Committee S-25. The Commission, like the Committee, has treated the two respondents separately. It has affirmed some findings, conclusions, and recommendations, revised some, and rejected others.

As a result of decisions on separate counts, the Commission recommends that Stephen M. Zang be suspended from the prac-

tice of law for one year, that C. Peter Whitmer be suspended from the practice of law for 90 days, that other sanctions be imposed, and has ordered certain counts dismissed.

II
PROCEDURAL HISTORY

The several charges identified by separate Bar numbers in the caption of this matter ultimately resulted in the filing of a formal complaint in ten counts on December 14, 1982. Following rejection by the Supreme Court of a special action[2] in June 1983, a first amended complaint in nine counts was filed on July 5, 1983. Certain discovery motions were decided, and Respondents' motions to disqualify the Committee and Bar Counsel were denied by order dated September 15, 1983. By order dated November 21, 1983, the Committee permitted the filing of a second amended complaint in ten counts.

The case proceeded to hearing before Committee S-25 from January 23 through January 27, 1984 ("Session I"). During Session I, Bar Counsel moved to amend the complaint by adding a new Count Eleven, which was granted on March 1. The third amended complaint was filed on March 21, 1984. The hearing concluded before the Committee during March 21 through March 24, 1984 ("Session II").

There are two respects in which the foregoing does not adequately describe disposition of charges originally before the Committee and how they changed as a result of hard-fought discovery. First, the conduct charged in certain counts as violating the disciplinary rules changed from complaint to complaint, though the subject of those counts remained the same. In other instances, the original charge was essentially dismissed and a new type of violation substituted for the previous count. For example, Count Eight of the original complaint charged the fourth violation under No. 82-1, whereas Count Eight in each of the amended complaints contained the charge from No. 83-1. Accordingly, it is appropriate to describe the charges under each bar number according to the counts of the complaint in which it is contained.[3] Where one Bar number contains more than one charge, it has been subdivided by letter in the following table.

Bar Charges by Count of Complaint

Charge Bar No.	Original Complaint	First Amended	Second Amended	Third Amended
82-1(A)	5	5	5	5
82-1(B)	6	6	6	6
83-1(C)	7	7	7	7
82-1(D)	8	—	—	—
82-1(E)	9	9	9	9
82-7	2	2	2	2
82-8	1	1	1	1
82-9	10	—	—	—
82-12	3	3	3	3
82-13	3	3	3	3
82-14(A)	3	3	3	3
82-14(B)	4	4	4	4
83-1	—	8	8	8
83-2	—	—	10	10
83-3	—	—	—	11

On November 8, 1984, Committee S-25 filed its Summary of Findings, Conclusions and Recommendations, and its separate Opinion of Findings, Conclusions and Recommendations in this matter, both dated October 28, 1984. Respondents objected to the Committee's report and they and Bar Counsel filed additional briefs for review by this Commission. Following the hearing of May 11, 1985, the Commission rendered the decisions reflected in this Report, and in the separate Order Upon Decision.

Each count of the third amended complaint and the charges otherwise disposed of will be stated separately. Each such statement includes findings of fact, conclusions of law and recommended disposition. In accordance with its customary practice, the Commission has in many instances adopted the findings and conclusions of the Committee as its own. The Commission expresses its appreciation to the members of the Committee for their arduous efforts in a substantial case.

III
PRELIMINARY MATTERS

In addition to the subject of original charges later dropped ("non-count charges"), Respondents brought certain preliminary motions before the Commission.

Motion to Present Additional Evidence

The Commission unanimously denied Respondents' motion to present additional evidence. The parties were advised of the ruling at the commencement of the hearing.

Motion to Dismiss

In their objections to the Committee's findings, conclusions and recommendations, and before the Commission, Respondents claimed that the procedure followed before the Committee was a denial of due process. The essence of this claim, which is well stated in papers filed by Respondents and in argument before the Commission, is that the Committee joined as one with Bar Counsel as part of a single prosecutorial team, thus foregoing the independence that must characterize a quasi-judicial body if a fair hearing is to be held. As evidence for the charge, Respondents cite continued investigation by the Committee of possible additional charges after the filing of the original complaint, permitting amendment of the complaint to include those new charges, engaging in *ex parte* communications with Bar Counsel concerning the case, antipathy toward witnesses called by the Respondents, findings of probable cause on certain counts without consulting with Respondents, resulting bias and prejudice by the Committee in general, bias in fact by members of the Committee, and specifically the addition of Count Eleven of the third amended complaint after commencement of Session I of the hearing. The details of these claims are well discussed in the record, which the Commission has examined.

The roles of the Committee and Bar Counsel are worthy of special note. As was customary under the former rules, Bar Counsel assisted the Committee in its investigative phase before a finding of probable cause by filing of the formal complaint. *See*

Ariz. R. Sup. Ct. 33(b)(3) (deleted 1985). According to affidavits in the record, Bar Counsel further met with the Committee *ex parte* after the filing of the complaint to recommend amendments including deletions and additions to the complaint, but not any recommendation on ultimate decision concerning the allegations of the complaint. Apparently, Bar Counsel also met with the Committee as its legal adviser on the motions to disqualify.

While the present rules insulate the hearing committee from the investigatory and probable-cause process, that is not a constitutional requirement. The combination of those functions with adjudication is "not inherently unfair or violative of due process." In re *Davis*, 129 Ariz. 1, 3, 628 P.2d 38, 40 (1981); *see Withrow v. Larkin*, 421 U.S. 35 (1975).

Similarly, amendment of the complaint to add additional charges during the pendency of the proceeding is not in itself unconstitutional. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. ____, ____, 105 S. Ct. 2265, 85 L.Ed.2d 652, 674-75 (1985); In re *Riley*, 142 Ariz. 604, 691 P.2d 695 (1984). The question is whether these respondents had an appropriate opportunity to defend. The record discloses that although the third amended complaint was not filed until March 21, Bar Counsel moved to add Count Eleven during Session I in January, objections to the motion were thoroughly argued, and the amendment was granted on March 1. Resondents presented a case in defense at Session II.

Findings of Fact

A. The members of Special Administrative Committee S-25 were not biased and prejudiced.

B. Neither Bar Counsel nor the members of Special Administrative Committee S-25 exhibited excessive prosecutorial zeal, or other prejudicial or unwarranted conduct.

C. Respondents were afforded sufficient time and process to defend against Count Eleven of the third amended complaint.

Conclusions of Law

1. The conduct of Bar Counsel and the members of Special

Committee S-25 did not constitute a denial of due process or of Respondents' right to a fair hearing.

2. Respondents were afforded an appropriate opportunity to respond to and defend against the charges in Count Eleven of the third amended complaint.

Decision

Respondents' motion to dismiss on due process grounds is denied by the Commission and should be denied by the Court.

Decision: Unanimous

IV
NON-COUNT CHARGES

The following charges originally brought against Respondents, but not contained in the third amended complaint, have been dismissed by separate order of the Commission pursuant to its authority under Ariz. R. Sup. Ct. 36(d)(deleted 1985); *see* Ariz. R. Sup. Ct. 53(d)(2): Bar Nos. 82-1(D)-S25 comprising count eight of the original complaint, and 82-9-S25 comprising count ten of the original complaint, each against both Zang and Whitmer.

Decision: Unanimous.

V
GENERAL FINDINGS OF FACT RELATING TO RESPONDENTS' PRACTICE OF LAW

A. Respondent Zang graduated from Arizona State University College of Law in 1973, and was admitted to the bar in Arizona on December 4, 1973. Prior thereto, he had earned an M.D. degree from Stanford University, having graduated in 1968. He briefly practiced medicine and consulted on medical-legal matters out of state before returning to Arizona, where he and Respondent Whitmer formed the law firm Zang & Whitmer, Chtd.

B. Respondent Whitmer was admitted in Arizona on September 16, 1970. He graduated from Arizona State University College of Law in 1970, and after four years in private practice became of a member of the Maricopa County Attorney's office in 1974, where he practiced criminal law for four years. His background also included expertise in the computer field,

wherein he had worked as an analyst and programmer with General Electric for approximately five years.

C. The law firm Zang & Whitmer, Chtd. began practice in 1979. It was originally conceived by Zang and Whitmer as a personal injury law firm, from which conception they have not materially deviated. The Respondents envisioned a firm wherein the necessary administration and regulation of the practice was automated through the use of computer-generated forms, letters, requests for information, checklists, settlement brochures and similar documentation. The practice, while not expressly limited to smaller or more modest types of cases or amounts, nonetheless operated and continues to operate largely on a relatively small-dollar, high-volume basis, as opposed to a more selective, high-dollar practice sometimes associated with personal injury law firms.

D. The firm Zang & Whitmer, Chtd. employed several staff members, incuding paralegals, investigators, and others. The nature of the practice was highly structured, with a substantial amount of work being delegated to paralegals. The initial interviews, settlements, negotiations with insurance adjusters, and client communications were principally being handled by Respondent Zang. The running of the office, researching of necessary legal points, preparation of pleadings and other court documents, maintenance of the computer and computer-generated forms, and general administration was handled principally by Respondent Whitmer.

E. Respondents have advertised the availability of their legal services through various means, and four of the charges of unethical conduct relate to those methods of advertising. The evidence contained numerous examples of advertisements placed by Respondents on television and in print.

VI
COUNT ONE

This count contains the charge in Bar No. 82-8-S25 against both Zang and Whitmer. By separate order, the Commission has adopted the Special Committee's findings and conclusions, as amended, and dismissed Count One. Accordingly, no discussion

of the allegations appears in this report. Ariz. R. Sup. Ct. 32(d)(1), 36(d), 37(i)(deleted 1985); *see* Ariz. R. Sup. Ct. 46(g)(12), 61(f).

Decision: Unanimous.

VII
COUNT TWO

This count contains the charge in Bar No. 82-7-S25 against both Zang and Whitmer. By separate order, the Commission has rejected the Special Committee's findings and conclusions, and dismissed Count Two on the ground that there is insufficient evidence to support, by clear and convincing evidence, a conclusion that the rule was violated. Accordingly, no discussion of the allegations appears in this report. Ariz. R. Sup. Ct. 32(d)(1), 36(d), 37(i)(deleted 1985); *see* Ariz. R. Sup. Ct. 46(g)(12), 61(f).

Decision: Unanimous.

VIII
COUNT THREE

The heart of the Bar's advertising complaint against both Respondents is found in the allegations of Count Three, which contains the charges in Bar Nos. 82-12-S25, 82-13-S25, and 82-14(A)-S25.

Allegations

Both Zang and Whitmer are charged under this Count. The ethical rules the State Bar contends the Respondents have breached are DR 2-101(A) and DR 1-102(A)(4), which state, respectively:

> (A) A lawyer shall not, on behalf of himself, his partner, associate or any other lawyer affiliated with him or his firm, use or participate in the use of any form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim.
>
> * * *
>
> (A) A lawyer shall not:
>
> * * *
>
> (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

Findings of Fact

A. Respondents Zang and Whitmer have published and continue to publish advertisements in general circulation media. Print advertisements have appeared in the *Arizona Republic TV Digest*, the *Active Cable TV Guide*, *The Arizona Republic*, the *Phoenix Gazette*, the *Tempe Daily News*, the *Mesa-Tempe TV Time*, the *Mesa Tribune TV Viewing Guide*, and various issues of the *Pennysaver*.

B. Bar Exhibit 14 is a print advertisement published in December 1982, and contains the following language prominently displayed:

"Detailed Preparation
is part of Zang & Whitmer, Chtd. because: the better your case is prepared for trial, the more likely your case will settle out of court without delay or hassles."

This language and the remainder of the text appear directly beneath a prominent photograph of a judge in a courtroom.

C. Bar Exhibit 15 is a print advertisement containing the following language prominently displayed:

"Medicine and Law
are combined at Zang & Whitmer, Chtd. because: to prove serious injury and future suffering, your lawyer must have the knowledge to make complicated medical facts clear for the jury."

D. Bar Exhibit 16 is a print advertisement containing the following language prominently displayed:

"Licensed Investigators
are part of Zang & Whitmer, Chtd. because: an investigator searches out witnesses, examines evidence at the accident scene, and discovers the facts essential for victory in the courtroom."

E. Bar Exhibit 17 is a print advertisement containing the following language prominently displayed:

"Evidence
is part of Zang & Whitmer, Chtd. because: the defense will use words and opinions to minimize their fault and your injuries. Only proof of facts will stop them."

This language and the remaining text appear directly beneath a photograph of a woman sitting in a witness box.

F. In Bar Exhibits 14, 15, 16 and 17, the language quoted in the above findings is immediately below the bold-face caption "Law is Civilized Warefare!," above a picture of Zang and Whitmer, and to the left of the following language:

We're the personal injury law firm:

*with the medical experience to understand complicated injuries

*with investigators to find witnesses and hidden evidence

*with computers for speed, accuracy and research

Free Consultation

No recovery—no attorneys' fee

G. A reasonable, objective person would interpret Bar Exhibits 14, 15, 16 and 17 to refer generally to the trial of lawsuits. Specifically, such a person would believe the advertisements were stating, respectively, that Respondents prepare cases for trial, combine medicine and law to present facts clearly to the jury, do presentations to juries, use investigators to aid in obtaining victory in the courtroom, and prove facts and defeat defenses in court.

H. In addition, Respondents aired broadcast advertisements on stations in the Phoenix area.

I. Respondents caused Bar Exhibits 19 and 20 to be broadcast on Phoenix-area television stations very often during the period October 1982 to June 1983. Respondents prepared and used other video commercials of similar subjects and varying lengths.

J. In addition to direct printed and aural statements in video presentations, which are analogous to print advertisements, a reasonable person will detect one or more messages from such other content as (1) the geographic or physical context of the visuals, (2) the activities of objects or persons in the visuals, (3) the sounds associated with such activities, (4) the camera technique used in each scene, such as closeup or other framing, choice of angle, choice of focus, and changes in those factors, (5) the visual pacing from scene to scene, such as editing for quick cuts or slow dissolves, (6) the selection of sounds used and their aural relationships, such as music, natural sounds and background voices, (7) the sound technique used in each scene, such as silence, frenetic or quiet music, and grating or peaceful

background, and (8) the aural pacing from scene to scene, such as mixing for abrupt change or smooth transition. As a result of the foregoing and other factors, a responsible person will consciously and clearly perceive certain messages from a video presentation, without the aid of technical knowledge of those factors, expert opinion, or psychological or other surveys. A reasonable person will consciously perceive certain other messages only with the aid of one of the things last mentioned.

K. Bar Exhibits 19 and 20 each contain a climactic scene showing Zang arguing before a jury in a courtroom, with the viewer located visually in the jury box.

L. A reasonable person without special aids or knowledge would interpret Bar Exhibits 19 and 20 as stating clearly that Zang and Whitmer take cases to court and argue before juries.

M. Expert testimony clearly and convincingly supports a finding that one message of Bar Exhibits 19 and 20 is that Respondents or other lawyers in their firm are willing to, able to, and do prepare personal injury cases for, and take them to trial.

N. The referenced print and broadcast advertisements, among others utilized by Respondents, would fairly be interpreted by a reasonable person as representations that Respondents have an unusually high level of expertise and experience in personal injury law, specifically including trial experience.

O. It was the general policy of Respondents not to take cases to trial, but to settle them whenever possible before trial. When trial was necessary, it was Respondents' general policy to refer cases to other lawyers to litigate. Respondents were not experienced litigators.

P. Statements in the discussion below of facts found are incorporated herein by reference.

Discussion of Issues

The evolution of modern concepts of lawyer advertising began with the United States Supreme Court's pronouncements in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), a case arising from this jurisdiction. Since the *Bates* decision, the advertising of legal services has expanded, and become sophisticated and increasingly complex. In addition to *Bates*, courts have continued

to touch upon the issue, including the United States Supreme Court in *In re R.M.J.*, 455 U.S. 191 (1982), and more recently, *Zauderer v. Office of Disciplinary Counsel, supra. See generally Annot.*, "Advertising as Ground for Disciplining Attorney," 30 A.L.R.4th 742 (1984).

The essence of lawyer advertising is to "facilitate the process of informed selection of a lawyer by potential consumers of legal services," DR 2-101(B), and to ensure that meaningful information, useful to such consumer, is made available to persons who do not have detailed knowledge of lawyers or the work that they do.

The advertising for the availability of legal services must be, above all else, true, and not misleading, deceptive, fraudulent or false. The lay public must be able to rely upon the information it receives from the legal community as being accurate, representative of the lawyers' current ability and willingness to perform, and true. A knowingly false communication is an ethical violation, and cause for sanction. The integrity of the profession, and the public's perception thereof, does not encourage knowing minor or technical violations, or violations that may not, arguably, be "material." The disciplinary rule does not discuss technical violations, nor does it impose a standard for determining whether a particular misrepresentation or falsehood is immaterial or "de minimus." The rule is unequivocal. It requires the communication of both helpful and true information. *See also* DR 2-101(C).

It is clear that the Supreme Court of this state may make rules governing the public conduct of lawyers, including their advertising. It is equally clear, however, that lawyer advertising is "commercial speech" protected by the first amendment of the U.S. Constitution, as *Bates*, *R.M.J.*, and *Zauderer* proclaim.

Our general approach to restrictions on commercial speech is also by now well-settled. The States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading . . . or that proposes an illegal transaction. . . . Commercial speech that is not false or deceptive and does not concern unlawful activities, however, may be restricted only in the service of a substantial governmen-

tal interest, and only through means that directly advance that interest. . . .

Zauderer v. Office of Disciplinary Counsel, supra, 471 U.S. at ____, 85 L.Ed.2d at 664 (citations omitted).

One should be clear what Count Three does not involve. There are no questions here of dignity or proper tone, *see Carey v. Population Services Int'l,* 431 U.S. 678 (1977), or the mode or manner of presentation of the advertising message, *see Ohralik v. Ohio State Bar Ass'n,* 436 U.S. 447 (1978). It is a question plain and simple whether Respondents' advertising was false and misleading.

Unlike the Dalkon Shield advertisements in *Zauderer,* Resondents' advertisements stated that lawsuits handled by them would be taken to trial by real experts and, impliedly if not explicitly, that they had a high rate of success. *See id.,* 471 U.S. at ____, 85 L.Ed.2d at 655. Even though the two media utilized are different, and "the special problems of advertising on the electronic broadcast media will warrant special consideration," *Bates v. State Bar of Arizona,* 433 U.S. 350, 384 (1977), the findings indicate that the message conveyed here is equally strong in both cases. *Cf. Zauderer v. Office of Disciplinary Counsel, supra,* at ____, 85 L.Ed.2d at 667; *Id.* at ____ & n.1, 85 L.Ed.2d at 687 & n.1 (separate opinion).

The Respondents admit that they caused the advertisements, which are in evidence, to be shown to the public or placed in print media. They admit that they produced the same, or reviewed it prior to its dissemination. No defense has been asserted that the Respondents were without knowledge of the advertising presented to public.

The evidence presented to the Committee was voluminous, and it included expert testimony on both sides. Ultimately, the Committee was required to measure the content and message communicated by the advertisements, against the legal services delivered to the consumer by Respondents. The principal import of the vast majority of the advertisements delivered to the public was that the Respondents possessed an unusually high level of expertise and experience in personal injury law, which specifically included trial experience, and were offering the full and

rounded services to potential clients. The advertisements were laudatory, self-serving, and highly dramatic. Certain television advertisements, broadcast in 1982, portrayed Respondent Zang apparently arguing a case to a jury, while many of the printed advertisements overtly associated the firm with actual courtroom experience and presentation. The advertisements presented Respondents as being complete personal injury lawyers, when in truth the Respondents acknowledged that they had negligible personal injury trial experience, and settled virtually all of their cases. In those rare instances in which a case was not settled, the Respondents referred them to other lawyers, who were usually not associated with the firm during the time in question. As a result, the client, or consumer of legal services, was intentionally given the impression not only that Respondents were capable of preparing a case for settlement or trial, but also that they were ready, willing and able, and in fact would try a case to conclusion on their behalf. In truth, while Resondents were actively promoting their firm as as firm with trial experience and possessed of judgment based upon actual personal injury trials and preparation therefor, they were not willing to undertake such trial tasks, and had little personal injury trial experience. (*See, e.g.*, Tr. Vol. A, p. 56, 69). Therefore, their advertisements were false and misleading to the public.

The evidence showed that the Respondents were, had they chosen to be so, "ready" to take cases to trial. Their methods of gathering information, compiling it, discussing cases with witnesses, efficiently gathering facts, and other pre-trial preparation were capable. Moreover, had Respondents chosen to do so, they could undoubtedly have become experienced litigators, and their backgrounds and prior experience afforded them the tools with which to become able personal injury trial lawyers. However, by not having the benefit of that personal injury trial experience, and by a policy of specifically personally avoiding trial and then referring cases to others in those few instances where they were unable to obtain settlements, they evidenced an unwillingness to confront witnesses in an adversarial context and risk the uncertainties associated with any trial. Further, there was no practice to inform clients at the outset that if the

matter were to go to trial, it would be sent outside the firm to be handled by some attorney whose identity was yet unknown.

Were the Respondents' clients served or injured by that practice? There is insufficient evidence to determine if, in any specific instance, a client of the Respondents' firm suffered injury because of Respondents' unwillingness to try cases, by perhaps accepting settlements which might have been higher, had Respondents been known for their willingness and ability to try cases. Evidence before the Committee, presented by both the Bar and Respondents, differed on this issue. Nonetheless, the determination of injury to a client is not material if unethical conduct is found. The possibility is present that a client might, or could in the future, be injured by his or her reliance upon untrue advertising that portrays a law firm as having the experience and willingness to take cases to trial when the need arises. In no instance did the Rèspondents testify that they advised clients that, in the event a case must be taken to trial, they would refer the matter to lawyers not even associated with their firm. The clients had a right to expect and rely upon the representation that the attorneys who were advertising their services as personal injury trial lawyers, and who utilized dramatic symbols of conflict—courtrooms, one of their members arguing to a jury, confrontation and litigation—in their advertising, would be prepared to handle their case and try it to a judge or jury if necessary. As a result, a "Wizard of Oz" syndrome was created; that is, an ominous imposing and masterful impression was presented on a two-dimensional screen, when in reality, something less than what was represented was turning the dials on the computers behind the curtains.

Parenthetically, we do not, by this opinion, condone needless litigation when a just, fair and reasonable settlement may be obtained with the client's consent. Moreover, we recognize that every lawyer who has passed the bar examination of the State of Arizona, and who is licensed to practice in this state, is equally permitted to appear in court, before a judge or a jury, in a personal injury case. No special certification is required in order to do so. Thus, even the rawest and newest lawyer is under no impediment to try personal injury cases from the day he is sworn in, and he

may also represent himself to the public as being licensed to practice before a court, and to try cases to courts and juries. The pitfall in Respondents' case, however, is that while they represented themselves as having the willingness to try cases, they in fact scrupulously avoided it. In fact, Stephen Zang testified that while he was personally competent to prepare cases for trial, he was not competent to handle a personal injury case.

We do not believe that it is fair to the community at large, which is largely unfamiliar with the legal process, to assume that they are obtaining complete and experienced legal services when such are not, in fact, available to them. A client, when he chooses a lawyer through the advertising process, has a right to expect that that lawyer will be able and willing to act in the manner represented. In this case, it is clear that Respondents had no intention of taking a case personally to trial, and that express and implied representations of their courtroom abilities were false, misleading, and untruthful.

Conclusions of Law

1. Respondents Zang and Whitmer violated DR 2-101(A) by making false, misleading and deceptive statements.

2. Respondents Zang and Whitmer violated DR 1-102(A)(4) by conduct involving dishonesty and misrepresentation.

Recommendation

As to Respondent Zang: Suspension of ninety days, concurrent with other discipline imposed in this case.

As to Respondent Whitmer: Suspension of ninety days, concurrent with other discipline imposed in this case.

Decision as to findings and conclusions: 7 aye, 2 nay.

Decision as to recommendation: 5 aye, 4 nay.[4]

IX
COUNTS FOUR AND FIVE

Count Four contains the charge in Bar No. 82-14(B)-S25, and Count Five contains the charge in No. 82-1(A)-S25. Both these counts are against both Respondents, and have been disposed of by separate, final order of the Commission. Accordingly, no

discussion of the allegations appears in this Report. Ariz. R. Sup. Ct. 32(d)(1), 36(d), 37(i)(deleted 1985); *see* Ariz. R. Sup. Ct. 46(g)(12), 61(f).

Decision: 8 aye, 1 abstaining.

X
COUNT SIX

Count Six contains the charge in Bar No. 82-1(B)-S25 against both Zang and Whitmer. By separate order, the Commission has adopted the Special Committee's findings and conclusions, as amended, and dismissed Count Six. Accordingly, no discussion of the allegations appears in this report. Ariz. R. Sup. Ct. 32(d)(1), 36(d), 37(i)(deleted 1985); *see* Ariz. R. Sup. Ct. 46(g)(12), 61(f).

Decision: 8 aye, 1 nay.

XI
COUNT SEVEN

This count contains the charge in Bar No. 82-1(C)-S25 against Zang and Whitmer. It has been disposed of by separate, final order of the Commission. Accordingly, no discussion of the allegations appears in this report. Ariz. R. Sup. Ct. 32(d)(1), 36(d), 37(i)(deleted 1985); *see* Ariz. R. Sup. Ct. 46(g)(12), 61(f).

Decision: 8 aye, 1 abstaining.

XII
COUNT EIGHT

Count Eight contains the charge in Bar No. 83-1-S25. The ethical violations, charged only against Zang, are the same as in Count Three: DR 2-101(A) and 1-102(A)(4). No charge is made against Whitmer.

Findings of Fact

A. Another advertising issue relates to Respondents' advertisements, and the use of appellations in correspondence with both legal and lay third parties, both modes of communication stating that Respondent Zang was a fellow of the American Academy of Forensic Sciences and of the American College of Legal Medicine. Most of the advertisements placed in print

media by Respondents, including the VAL-PAK coupon mentioned in Count Three, contained references to those organizations.

B. At the time that such representations were placed in advertisements for legal services, Respondent Zang was not a current member of either of those organizations. It is evident that Respondents believed that reference to those organizations would have a favorable impact upon the lay public, in its search for meaningful information, which would enable it to locate counsel, and to better make an informed judgment as to which lawyer a person might choose to represent him. Respondent Zang testified that he believed, at all times, that he was in fact a member of those organizations, even though his membership had lapsed several years before.

C. Respondent Zang's fellowship in the AAFS was terminated on October 6, 1977, and his fellowship in the ACLM was terminated on December 7, 1978. Pursuant to the rules of those organizations, Zang thus ceased to have any status with those organizations. Mr. Zang was thus not a fellow of either organization when he claimed fellowship status in the 1980 advertisements and in subsequent letters generated by Zang and Whitmer. As such, the representations were false, untrue and misleading.

Discussion of Issues

These references to the organizations at no time referred to Respondent Zang's status as a "former" or "ex-" member. Indeed, DR 2-101(B)(13) expressly authorizes a lawyer to advertise his *membership* in scientific, technical and professional associations and societies. The falsity of the representations in print, by Respondents, was that it implied current and active membership and ongoing association with these societies, and was so intended by Respondents.

Mr. Zang's version that he believed that he was maintaining current membership in the organizations is not borne out by the evidence. His statements as to why he allegedly believed that he was still an active member of the organizations are inconsistent. He knew or should have known that he was required to pay an-

nual dues; he joined on the basis of that information. He voluntarily allowed his membership to lapse. He was unable to satisfactorily explain how or why he continued to receive literature from the organizations, and yet at one point allegedly instructed his bookkeeper to continue paying dues. When the mailings stopped, he did not ask his bookkeeper whether the dues had or had not been paid. Finally, after allegedly "learning" of his nonfellowship status in these organizations, he did not move to have his membership revived, but continued to hold himself out, at least through correspondence, as still being a current member of these organizations.

The written advertisements prominently display these memberships. Respondent Zang either knew or should have known, or had a duty to apprise himself of his status in each organization, at a time when he was actively producing, editing and reviewing advertisements which would be submitted to the public, and which were intended by Respondents to convey meaningful information to consumers of legal services. Such care is required in order to protect the public from receiving false information. It is no defense to the ethical violation of falsehood that Respondent Zang had not lost those skills for initial membership in organizations to which he had been academically admitted and professionally sponsored, and that he still retained the academic qualifications required of any other member of that organization. The ethical violation lies in the willful, knowing or reckless disregard of truth, when making representations to the public, without making any apparent effort to verify the accuracy or currency of that information. The rules of truthful advertising of professional services do not permit such overt negligence.

Conclusion of Law

Respondent Zang, through advertising and the knowing, willful or reckless use of the untrue information concerning Zang's membership in professional organizations to which his membership had lapsed years before, violated both DR 1-102(A)(4) and DR 2-101(A).

Recommendation

As to Respondent Zang: Suspension of 90 days, concurrent with other discipline imposed in this case.

As to Respondent Whitmer: No charge.

Decision as to findings and conclusions: Unanimous

Decision as to recommendation: 7 aye, 2 nay. The Court is informed that the commissioners in the minority were of the opinion that the recommendation of the Special Administrative Committee should be accepted.

XIII COUNT NINE

The count contains the charge in Bar No. 82-1(E)-S25, and alleges violations by both Zang and Whitmer of DR 1-1|2(A)(4), (6) and DR 7-102(A)(2), (3), (7) by failure to honor a subrogation right. The Committee did not find a violation by Whitmer, but it did by Zang.

Allegations

Respondents were entrusted with the personal injury case of client Betty Daniels. The complaint charges that Respondents settled property damage claims with both their client's insurance carrier and with the third party's insurance carrier, and then refused to allow subrogation in accordance with the provisions of the insurance policies involved. The following disciplinary rules were allegedly violated:

DR 1-102(A)(4) and (6):

(A) A lawyer shall not:

* * *

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

* * *

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

DR 7-102(A)(2), (A)(3) and (A)(7):

(A) In his representation of a client, a lawyer shall not:

* * *

(2) Knowlingly advance a claim or defense that is unwarranted under existing law, except that he may advance

such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.

(3) Conceal or knowingly fail to disclose that which he is required by law to reveal.

* * *

(7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.

The Bar alleges that Respondent Zang wrongfully settled Ms. Daniels' claim for property damage, twice. Moreover, that the firm failed to take any steps to cure or remedy that problem, and by so doing, knowingly interferred with Ms. Daniels' carrier's (State Farm's) right of subrogation with respect to the property damage claim that State Farm had prevously paid. It is further alleged that execution of a general release of all claims prejudiced the right of State Farm to subrogate, as a matter of law, and that these results were known or should have been known by Zang and the firm Zang & Whitmer, Chtd. It is contended that the knowing and willful disregard and breach of the client's written contract with her insurance company was encouraged by Zang and Whitmer, and that their conduct in so doing was unethical.

Findings of Fact

A. On April 4, 1981, Betty Daniels was injured and incurred property damage, when her Ford Maverick was struck by a vehicle driven by Manuel Jaramillo. Betty Daniels had a collision insurance policy with State Farm Insurance Co., and Mr. Jaramillo carried liability insurance through Equitable Insurance Company. The firm Zang & Whitmer, Chtd. was retained by Betty Daniels to handle her case.

B. Respondent Zang negotiated the property damage portion of client Betty Daniels' claim with both insurance companies under both the first-party and third-party coverage, and effected a settlement with both comapnies.

C. In letters written by State Farm to Zang on April 13, 1981, April 20, 1981 and May 18, 1981, prior to ultimate settlement with either company, State Farm indicated its desire to subrogate.

D. On June 26, 1981, Ms. Daniels' carrier, State Farm, executed

a check in the amount of $1,400.00 to Ms. Daniels in payment and settlement of her property damage claim (less the applicable deductible).[5] Thereafter, on July 21, 1981, Equitable General Insurance Company, Mr. Jaramillo's carrier, "in payment of any and all claims," submitted its check to Betty Daniels, through Zang & Whitmer, Chtd. for the sum of $3,900.00.

E. On July 27, 1981, Ms. Daniels signed a release in payment of any and all claims, including therein "all known and unkown, foreseen and unforeseen bodily and personal injuries and property damages and the consequences thereof resulting or to result from the accident, casualty or event which occurred on the 4th day of April, 1981 . . . " Zang's signature was also placed on the release. The firm deducted a fee from both checks, and remitted the balance to the client. Upon distribution of the funds, the firm took its one-third contingency fee from the property damage settlement that its client had received from State Farm, and the firm also took a one-third fee from the total settlement obtained from Equitable.

F. Following Zang's settlement with Equitable on or about July 27, 1981, State Farm determined that Equitable's settlement had included property damage, and, by letter dated August 10, 1981, State Farm apprised Zang of the double settlement. State Farm made demand for a reimbursement payment, pursuant to its rights of subrogation, in an amount to be determined when the salvage was sold. Zang never responded.

G. State Farm's file, however, indicates that it had made a decision on July 16, 1981, to waive any rights of subrogation against Equitable because of the possible contributory negligence on the part of its insured, Betty Daniels. No evidence exists that this information was conveyed to Zang & Whitmer, Chtd. prior to the initiation of these proceedings.

Discussion of Issues

The only real issue presented in connection with this Count is whether Respondent Zang knew that he had settled with Equitable for property damage and collected twice for the same item, precluding State Farm from asserting its subrogation rights, and whether his subsequent refusal to attempt to reimburse State

Farm, taken together, constitute an ethical violation.

It is Mr. Zang's position that the settlement with Equitable dealt only with bodily injury. However, the Equitable file contains a demand letter stating that in the event it paid the property damage claim, it would require the title and lien release so that it could obtain the salvage value of the automobile; however, at no time did Equitable ever make any further effort to obtain title to the car for salvage value purposes. Moreover, the release signed by Zang and his client was for claims for both property damage and physical injury, and the draft read that it was in payment of "any and all claims."

The Committee finds that the release, given by Zang and his client to Equitable, necessarily defeated or prejudiced the subrogation right of State Farm against Equitable and its insured, and that Zang knew it, both because of his familiarity with personal injury release practices, the prior communications from State Farm, and the language of the Equitable release which he and his client signed.

The fact that State Farm may have, at one time, internally determined not to subrogate for other reasons was not a fact shown to have been known to Respondent Zang at the time the release was signed or afterward. Such is immaterial in any event, since, upon receiving notice of the complete settlement with Equitable, State Farm had not notified Zang or Daniels nor changed its position with regard to Ms. Daniels and its asserted subrogation rights, and its demand for subrogation was consistent with its earlier position.

Zang did know that he was settling more than just a bodily injury claim with Equitable and that by tendering a full release of claims he knew he was prejudicing State Farm's subrogation right.

Conclusions of Law

1. Respondent Zang assisted his client in collecting twice for the same property damage, and refused, on behalf of his client, to entertain any effort to reimburse State Farm, in violation of its known contractual rights, all in violation of disciplinary rules DR 102(A)(4), (6) and DR 7-102(A)(2), (3), (7)..

2. There is insufficient evidence of a clear and convincing nature to find a violation by Respondent Whitmer.

Recommendation

As to Respondent Zang: Suspension of ninety days, concurrent with other discipline imposed in this case.

As to Respondent Whitmer: Dismissal by separate order.

Decision as to findings and conclusions: 8 aye, 1 nay.

Decision as to recommendation: 6 aye, 3 nay.

XIV COUNT TEN

The charges in Bar No. 83-2-S25 are contained in this count, which alleges violations by both Zang and Whitmer of DR 1-102(A)(4), (6) and DR 7-102(A)(2), (3), (7).

Allegations

The Bar alleges that Respondents were dishonest in accepting, as part of a personal injury settlement, monies which they knew to have been rendered in error by the insurance company, or, when advised of the error, that they refused to return the money or assist in obtaining such return.

The disciplinary rules that Respondents allegedly violated are:

DR 1-102(A)(4) and (A)(6):

(A) A lawyer shall not:

* * *

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

* * *

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

DR 7-102(A)(2), (A)(3) and (A)(7):

(A) In his representation of a client, a lawyer shall not:

* * *

(2) Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.

(3) Conceal or knowingly fail to disclose that which he is required by law to reveal.

* * *

(7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.

Findings of Fact

A. Rebecca Drummond sustained injuries resulting from an automobile collision with William Bryan on January 12, 1981. Both Mrs. Drummond and William Bryan were insured by State Farm. Zang & Whitmer, Chtd. was engaged to represent Mrs. Drummond. However, prior to retaining Zang & Whitmer, Chtd., State Farm had offered Mrs. Drummond $1,100 in settlement of the property damage to the automobile, but this offer had not been accepted.

B. Zang communicated with State Farm and on February 9, 1981, State Farm advised him of the outstanding offer for the property damage. It is unclear whether the settlement was offered under the first-party coverage of Mrs. Drummond or the third-party coverage of Mr. Bryan. However, there was no apparent mention of the fact that there was a $100.00 deductible on the collision loss, which leads to the conclusion that the offer was based upon the third-party coverage.

C. Respondent Zang claims there was a dispute over the manner in which the property damage claim was to be paid. He did acknowledge there was no dispute over the sum of $1,100.00 that was offered by State Farm. Respondent Zang contended that he spent time arguing with the insurance company as to whether the $1,100.00 would be paid under the first-party or third-party coverage. We do not find this credible based on the evidence. Nor does it appear from any records that there was any dispute as to the manner in which this payment would be charged.

D. Thereafter, during subsequent negotiations with the State Farm adjuster, Respondent Zang was concerned with the bodily injury portion of the Drummond claim, which related to the third-party coverage.

E. The case log of the State Farm adjuster, Francene Adcock, shows that the negotiations began with Drummond's demand

for $8,000.00. After receiving authority from her company to settle for $3,000.00, Mrs. Adcock responded on May 11, 1981, and offered $2,000.00 for the bodily injury portion of the claim. That log further indicates that at that time in the negotiations Respondent Zang then reduced his demand to $3,500.00, and also states that Zang felt he could not go any lower. Ms. Adcock's log further reflects she was authorized to settle for $3,000.00 and discussed with Zang a settlement range between $2,400.00 and $3,000.00. Adcock testified that Zang reduced the personal injury offer to $3,500.00. Respondent Zang, however, contends that he never dropped his demand below $6,000.00, and cites his later filing of suit, and a corresponding settlement letter setting forth that amount as corroboration, and that he "remained" willing to settle for $6,000.00.

F. After a period of time in which nothing significant occurred with regard to the deadlock in negotiations, Ms. Adcock internally requested authority to settle the case for a total of $4,500.00 ($3,400.00 for the bodily injury claim and $1,100.00 for property damage). She received that authority on June 30, 1981.

G. Respondent Zang, meanwhile, also trying to break the deadlock, on July 2, 1981, filed a lawsuit and wrote State Farm a letter offering to dismiss the case in consideration for a payment of $6,000.00.

H. During the settlement negotiations, an error occurred when Adcock reviewed the wrong file, *i.e.* the William Bryan file, and saw that the policy also included medical payments coverage. She mistakenly believed that the med-pay was available to Ms. Drummond under Ms. Drummond's first-party coverage. Upon discovering this apparent oversight, she immediately caused the issuance of a draft for the payment of submitted Drummond medical bills, which she believed were legally owing under the med-pay insurance contract in the amount of $1,295.05. Under a first-party medical payments policy, which Adcock believed Drummond had, the insured is entitled to reimbursement for medical bills incurred as the result of an accident, without regard to fault. Zang had previously submitted Drummond's bills as part of Drummond's claim for bodily injury. A State Farm draft, in the amount of $1,295.05, was mailed to Zang

on July 6, 1981, under separate cover, and included therewith was a transmittal letter identifying it as being for medical payments coverage, and requested that the medical providers be paid. This amount was in no way, on its face, related to the liability coverage.

I. By letter of July 7, 1981, Adcock attempted to induce settlement under the Bryan third-party liability policy, by sending what Respondent Zang termed a "drop draft," that is, a State Farm draft, for the total sum of $4,500.00 in full settlement of all claims including bodily injury and property damage.

J. This July 7 offer was consistent, less $100.00, with Adcock's understanding of Zang's counteroffer of $3,500.00 and with the property damage sum of $1,100.00 previously discussed. However, according to Adcock, Zang had previously stated he could not go below $3,500.00 for the bodily injury. This total offer thus then varied by $100.00 from Zang's prior stated positions. This draft and its accompanying documents were not discussed by Zang and Adcock prior to State Farm's mailing thereof.

K. Negotiations continued and on July 21, 1981, Adcock wrote to Zang advising that she could not settle the case for the "additional $500.00" Zang had apparently orally requested as a compromise. It is unclear from the letter as to what the $500.00 was considered to be in addition to. The negotiations deadlocked again. We construe that the "$500 more" related to the $4,500.00 drop offer, since if it is construed to related to the $5,795.05 that Respondent Zang then had in hand, but had not yet cashed, it would have taken his demand for settlement over the amount which he had offered by his letter of July 2, 1981, or $6,000.00, in order to settle the lawsuit.

L. Therefore, at this point in time, Respondent Zang had in his possession a med-pay check ostensibly issued under a nonexistent med-pay provision in the Drummond contract, in the amount of $1,295.05, plus the $4,500.00 settlement draft for bodily injury and property damage in the amounts of $3,400.00 and $1,100.00, respectively.

M. There was included with the check sent for medical pay coverage a transmittal form which indicated that the $1,295.05 was for medical pay coverage. At no time had Respondent Zang ever requested med-pay coverage on behalf of his client.

Moreover, he did not undertake to represent the client on the med-pay coverage, as he did by letter to Betty Daniels in her case. The med-pay draft was payable only to "Rebecca Drummond," and did not include Zang or the firm as a payee, and stated that the insured was Roger Drummond. The transmittal letter indicated how the figure was arrived at, that is, all medical bills were itemized to the penny.

N. The $4,500.00 settlement offer check was payable to Roger and Rebecca Drummond and Zang as attorney, jointly, and it indicated that it was made under third-party coverage since the insured was identified as William Bryan.

O. Zang testified that, after receipt of both checks, he met with the clients, but that they had rejected the total offer of $5,795.05 (Tr. Vol. 4, p. 215). Obviously, sometime later, that settlement was accepted. At that meeting, med-pay was not discussed. Further, at that time, Zang did not negotiate the med-pay draft at all, even though it would have had no effect on the settlement of the adverse liability claim. When the settlement was finally considered made, Zang endorsed both drafts, had his clients sign both drafts, took a one-third fee from each of the two drafts and disbursed the remaining money to Mrs. Drummond and her medical providers. He also dismissed the suit.

P. On July 28, 1981, Adcock discovered her mistake regarding the med-pay and telephoned Zang to confirm the error. Zang, in acknowledging the mistake and hoping to rectify it, told her that the $1,295.05 had provided the added incentive for him to settle the case and, together with the $4,500.00 drop draft, was close to his $6,000.00 offer. He refused to return the money. He also refused to send the one-third he had retained as his fee from the mistaken payment. Later, several items of correspondence were sent to Respondent Zang by members of State Farm's claims department, including a letter dated August 12, 1981. Respondent Zang was requested to return the med-pay money, and was again notified of the unilateral error. There was an offer by State Farm to return the release to Respondent Zang and to renegotiate their settlement or litigate, if necessary, the bodily injury claim. This is contrary to what Respondent Zang testified. He testified that he was the one who proposed that the release be returned

and that the bodily injury portion be renegotiated, but that the proposal was rejected by State Farm.

Q. On August 18, 1981, Respondent Zang rejected the suggestions to return any money or to renegotiate the claim and advised State Farm that the money had been disbursed to his client and that he was not willing to return any portion. In addition, Resondent Zang did not reveal that he had retained one-third of the mistaken payment as a contingent fee, nor did he at least offer to return payment of that sum. State Farm elected not to pursue the return of the money against the insured or Respondent Zang.

R. Zang did not inform his clients of the mistake (Tr. Vol. 4, p. 258), in order that they might have the option to return money obtained by them by virtue of another's error.

Discussion of Issues

Did Zang know that his clients were not entitled to medical payments under a separate first-party policy, and that such money tendered by mistake would unjustly enrich his clients? Did knowing acceptance of sums clearly drawn against a nonexistent policy constitute an ethical violation? Did Zang have an ethical obligation to return or make an effort to return those monies, or draw the mistake to the attention of his clients and the insurance copmpany before said sums were negotiated? After Zang acknowledged the mistake on August 18, 1981, did he have an ethical obligation to return at least that portion of his fee taken directly from the mistakenly paid monies? We find that the answers to all of these questions must be answered in the affirmative.

The Commission finds that Respondent Zang knew of State Farm's error before he negotiated the Drummond drafts, and that even if he had increased his demand to $6,000.00 by the form letter sent after the filing of the lawsuit, he immediately reduced his demand, post-filing, to a total of $4,000.00 for the personal injury claim, which was $500.00 above the $3,500.00 that we find he had made before, plus the $1,100.00 in property damage, for a total post-filing demand of $5,100.00.

It is also our finding that Respondent Zang had, in the early negotiations, made an offer of $3,500.00. It is interesting to note

that the letter forwarding the med-pay draft (Exhibit 43) broke down the sum of $1,295.05 by the amounts owed to various doctors, and expressly requested that Resondent Zang distribute it to medical providers. Respondent Zang's position on this is that the reason that he was not alerted to the error when he saw the separate $1,295.05 draft was because he suspected that it was "just another dirty trick by Francene Adcock." Such suspicion had to mean that he had knowledge that it was sent in the *form* of med-pay in order for him to infer that it was a dirty trick, when in fact it was intended, in his view, as part of the overall third-party liability and property damage claims. Thus, he knew that it could not be med-pay, and that his clients were not entitled to it.

Ethical practice dictates that such an "ambiguity" be affirmatively resolved, rather than by attempting to capitalize unjustly on what clearly appeared on its face to be, and what turned out to be, an obvious error. To unhesitatingly and unquestioningly conclude that the "dirty trick" was meant, creating a settlement pool larger than that which was ever actually sought, creates an impression of the professional attorney as one who can and will take advantage of other persons' errors at all costs, and who will attempt to capitalize on those errors. Such conduct is unethical. Equally reprehensible is that, when the error was discovered and acknowledged, Zang & Whitmer, Chtd. refused to return even that portion of the $1,295.05 mistaken payment which they had taken as a fee. Moreover, the client was not even given the opportunity to return the money voluntarily, had she chosen to do so. While the client may have justifiably and legally relied on the insurance company's unilateral error, she nonetheless may have chosen voluntarily to return funds received in error, and should have been advised of the mistake and offered the choice.

Conclusions of Law

1. The unethical conduct consisted in tendering the medical payment coverage funds to his client without disclosing or attempting to correct the error, and possibly subjecting his client

to potential litigation, partly to preserve his fee. This was a conflict of interest.

2. Respondent Zang's conduct in knowingly accepting a tender of funds which he knew to have been mistakenly received, and thereafter converting it to his client's use and recovering a fee on this sum, constituted conduct involving dishonesty, fraud and deceit as proscribed by DR 1-102(A)(4).

3. Such conduct reflects adversely on his fitness to practice law under DR 1-102(A)(6) and violates DR 7-102(A)(2) and (A)(7).

4. There is insufficient evidence of a clear and convincing nature to find a violation by Respondent Whitmer.

Recommendation

As to Respondent Zang: Suspension of one year, concurrent with other discipline imposed in this case.

As to Respondent Whitmer: Dismissed by separate order.

Decision: 7 aye, 2 nay.

XV
COUNT ELEVEN—DANIELS

This count contains the charges in Bar No. 83-3-S25, which alleges violations by both Zang and Whitmer of DR 2-106. Count Eleven deals with subject matter covered in Counts Nine (Betty Daniels) and Ten (Rebecca Drummond). It alleges that both Respondents received an excessive fee or other funds in both cases, which will be discussed separately.

Allegations

The rule allegedly violated states:

DR 2-106.

(A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

(B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
(3) The fee customarily charged in the locality for similar legal services.
(4) The amount involved and the results obtained.
(5) The time limitations imposed by the client or by the circumstances.
(6) The nature and length of the professional relationship with the client.
(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
(8) Whether the fee is fixed or contingent.

(C) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case.

Decision

By separate order, the Commission has rejected the Special Committee's finding, conclusions and recommendations, and dismissed the portion of Count Eleven relating to the Betty Daniels matter, on the ground that there is insufficient evidence to support, by clear and convincing evidence, a conclusion that the rule was violated. Accordingly, no discussion of the allegations appears in this report. Ariz. R. Sup. Ct. 32(d)(1), 36(d), 37(i)(deleted 1985); *see* Ariz. R. Sup. Ct. 46(g)(12), 61(f).

Decision: 6 aye, 3 nay.

XVI
COUNT ELEVEN—DRUMMOND

Findings of Fact as to the Rebecca Drummond Case

A. Rebecca Drummond was initially offered $1,100.00 in payment on her property damage claim, before Zang & Whitmer, Chtd. were retained. Zang was notified of this prior offer by let-

ters of February 9, 1981 and March 3, 1981. When Zang was retained, there was no substantive work done on the $1,100.00 claim. Further, State Farm took the initiative on February 9, when it wrote Respondent Zang a letter and advised him that it had made an offer which had not yet been accepted or rejected. On March 3, 1981, Respondent Zang was again reminded that this offer was outstanding and acceptance was invited. Therefore, it is clear from the evidence that State Farm was ready, willing and able to pay Mrs. Drummond the amount of the property damage settlement, but the offer was not accepted, nor was it shown that the client was given the opportunity to either accept or reject that particular claim, nor that she was even told about its status. Negotiations continued only on the bodily injury portions of the claim.

B. The findings contained in this Report under Count Ten are incorporated by reference.

C. Zang's representation did nothing but delay, for months, the claim of $1,100.00, less his one-third fee which he did not earn.

D. As to Whitmer personally, there is insufficient evidence by a clear and convincing standard, to establish direct participation in the violative conduct.

Discussion of the Issues

It is interesting to note that Respondent Zang testified that he fought with State Farm over whether the property damage would be paid under first-party or third-party coverage. Since $1,100.00 was the apparent amount that was paid for the property damage, but did not include a deductible, we must conclude that is what was paid under the third-party coverage. The fee actually taken was three times the amount which was saved.

There are no notes in the State Farm file or from testimony from Adcock that there was any disussion or confusion about the $1,100.00 payment as being by either first- or third-party carrier.

The testimony produced also evidences that Respondents received a contingent fee out of the proceeds sent by State Farm Insurance Company mistakenly for medical expenses as previously found by the Committee, in its findings in Count Ten, above.

The Commission finds that with respect to this Count, Respondent Zang knew or should have known that an error by the insurance company had been committed in medical-payment proceeds when in fact his client had no such coverage. Even after obtaining knowledge of this mistake by the insurance company, Respondent Zang never offered to refund even that portion of the payment upon which he took his fee.

Conclusions of Law

1. The retention by Respondent Zang of the fee portion, even after knowledge of the mistake, constitutes the collection of an illegal fee as proscribed by DR 2-106(A).

2. Although he rendered some assistance to his clients in the Drummond matter relative to the recovery of their claims, Respondent Zang charged excessive fees in violation of DR 2-106(A).

3. Respondent Whitmer was not directly involved with either the Daniels or Drummond cases, and apparently had no direct participation therein. However, by his own admissions, the fees collected in those matters were collected pursuant to a policy or a practice in the firm that charged said fees. It is incongruous that both Respondents take a position that their practice of settling cases, and in taking small cases which other attorneys would not be interested in handling, constitutes a service to the public which is not otherwise available or offered. They further justify this practice by claiming that they handle many small claims and do a professional job even though the case is small, and which would otherwise not receive attention elsewhere. In fact, the people with smaller cases who are attracted to their law firm by advertising are charged more, in reality, than other clients throughout the community, as the fee pertains to collection of first-party coverage.

4. Respondent Whitmer's participation in the firm's policy of establishing fee agreements which are misleading to the general public, by the omission of important information, fails to provide that the information necessary by a client can decide whether he desires Respondents Zang and Whitmer to proceed on first-party coverage claims on a contingent fee basis.

Respondents then put the burden upon that client to specifically point out to Respondents that he does not wish to be obligated to a contingent fee even though not so advised initially. The Committee further notes that Respondents have continually maintained throughout these disciplinary proceedings that the purpose of their practice was to provide a service to persons with small claims; that the standard fee agreement provides that upon the filing of a lawsuit on claims under $10,000, the contingency fee goes from one-third to 40 percent of all amounts recovered, which includes first-party coverage as well as recovery under third-party coverage. Although Respondent Zang testified that they do not take 40 percent of those recoveries, the potential abuse, even if Respondent Zang is correct, exists. Ultimately, the people who suffer are those with small claims who could obtain the same service elsewhere without losing one-third of the value of their property damage or medical payments claims, upon which no dispute as to payment exists.

Recommendation

As to Respondent Zang: Suspension of ninety days, concurrent with other discipline imposed in this case.

As to Respondent Whitmer personally: Dismissed by separate order.

As to both Respondents as shareholders of Zang & Whitmer, Chtd.: They shall make restitution and pay the erroneous portion of the payment made by State Farm Insurance in the Drummond matter to that company, and pay one-third of such sum as excessive fees retained to the Drummond client, both payments with interest at the rate of ten percent per annum from date of original receipt of funds.

Decision as to findings and conclusions: Unanimous.

Decision as to recommendation for Zang: 5 aye, 4 nay.

Decision as to recommendation for Whitmer: 8 aye, 1 nay.

Decision as to restitution: Unanimous.

HISTORY OF PRACTICE

According to the records of the State Bar of Arizona, Respondent STEPHEN M. ZANG:

1. Is Attorney No. 003617, and was admitted to practice in Arizona on December 4, 1973, before the federal courts in this district, and no other courts;

2. Advised on December 3, 1985, that he practices law at:

Suite A-207
1930 South Alma School Road
Mesa, Arizona 85202
Telephone: (602) 839-8300

and maintains a post office address at:

106 South 54th Street
Chandler, Arizona 85224
Telephone: (602) 961-0891

3. Has practiced law under the names Stephen M. Zang and Zang & Whitmer, Chtd.; and

4. Has not heretofore had discipline imposed upon him in this state.

According to the same records, Respondent C. PETER WHITMER:

1. Is Attorney No. 002623, was born in 1946, and was admitted to practice in Arizona on September 16, 1970, before the federal courts in this district, and no other courts;

2. Advised on December 3, 1985, that he practices law at:

Suite A-207
1930 South Alma School Road
Mesa, Arizona 85202
Telephone: (602) 839-8300

and maintains a post office address at:

106 South 54th Street
Chandler, Arizona 85224
Telephone: (602) 961-0891

3. Has practiced law under the names C. Peter Whitmer and Zang & Whitmer, Chtd.; and

4. Has not heretofore had discipline imposed upon him in this state.

DECISION

The Commission has this day entered a separate order in accordance with this Report.

DONE AT PHOENIX, ARIZONA on January 20th, 1986.

/s/ Henry R. Paytas, Chairman
Henry R. Paytas, Chairman

Footnotes

1. Ariz. R. Sup. Ct. 53(d)(2), 17A Ariz. Rev. Stat. Ann. 288 (Supp. 1985). Although this proceeding generally is governed by the "old" rules in force before February 1, 1985, the Commission has elected to follow the "new" rules in matters of form in the interest of consistency. *See* Order Deleting Rules 27 Through 49 of the Supreme Court, Etc., 139 Ariz. LXXIX (1984).

2. *Zang and Whitmer v. Toles*, Supreme Court of Arizona No. SB-275 (June 29, 1983).

3. Although the nature of the charge is described in each count of the complaints, it is considered inappropriate to do so in a report that will become public, when some of the charges were dismissed for lack of evidence or otherwise. *See* Ariz. R. Sup. Ct. 32(d), 36(d) (deleted February 1, 1985).

4. The Commission did not have before it and did not consider *In re Neville*, ____ Ariz. ____, ____ n.7, 708 P.2d 1297, ____ n.7 (1985), when decision was reached, but did consider it before filing of this Report.

5. As will be discussed in a later portion of this Report (Count Eleven), State Farm Insurance, on July 13, 1981, also issued its check in the amount of $775.50, relating to the medical payments portion of Ms. Daniels' policy.

APPENDIX C

DECISION OF THE
SPECIAL LOCAL ADMINISTRATIVE COMMITTEE
S25
OF THE
STATE BAR OF ARIZONA

Issued on October 28, 1984

Special Local Administrative Committee S25 of the

State Bar of Arizona

In the Matter of the Members	)	Matters No.
	)	
	)	82-1-S25
of the State Bar of Arizona,	)	82-7-S25
	)	82-8-S25
STEPHEN M. ZANG and	)	82-12-S25
C. PETER WHITMER,	)	82-13-S25
	)	82-14-S25
Respondents.	)	83-2-S25
	)	83-2-S25

SUMMARY OF FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

The Committee's written opinion is appended hereto, and made a part hereof. Unless otherwise noted, the findings, conclusions and recommendations are unanimous. The Committee makes the following findings, conclusions and recommendations.

COUNTS ONE, TWO, THREE AND EIGHT (ADVERTISING COUNTS)

Count One (Photographs)

1. Respondent Zang did not violate a disciplinary rule.
2. Respondent Whitmer did not violate a disciplinary rule.

Count Two (VAL-PAK)

1. Respondent Zang did violate a disciplinary rule.
2. Respondent Whitmer did violate a disciplinary rule.

Recommendation: Censure for each attorney.

Count Three (Misleading Advertising)

1. Respondent Zang did violate a disciplinary rule.
2. Respondent Whitmer did violate a disciplinary rule.

Recommendation: Six months suspension for each attorney to run concurrently with other suspensions.

Count Eight (Misleading Advertising-Society Memberships)

1. Respondent Zang did violate a disciplinary rule.
2. Respondent Whitmer did not violate a disciplinary rule.

Recommendation: Three months suspension for attorney Zang to run concurrently with other suspensions.

COUNT SIX (LUCIEN SMITH MATTER)

1. Respondent Zang did not violate a disciplinary rule.
2. Respondent Whitmer did not violate a disciplinary rule.

COUNT NINE (BETTY DANIELS MATTER-FAILURE TO SUBROGATE)

Committee Vote 2-1 (One dissent)

1. Respondent Zang did violate a disciplinary rule.
2. Respondent Whitmer did not violate a disciplinary rule.

Recommendation: One year suspension for Respondent Zang to run concurrently with other suspensions.
(Dissent by Jeremy Toles)

COUNT TEN (REBECCA DRUMMOND-INSURANCE COMPANY ERROR)

1. Respondent Zang did violate a disciplinary rule.
2. Respondent Whitmer did not violate a disciplinary rule.

Recommendation: One year suspension for Respondent Zang to run concurrently with other suspensions.

COUNT ELEVEN (EXCESSIVE AND ILLEGAL FEES)

1. Respondent Zang did violate a disciplinary rule.
2. Respondent Whitmer did violate a disciplinary rule.

Recommendation:

1. Respondent Zang be suspended for one year concurrent with other suspensions.

2. Respondent Whitmer to be censured for his participation in a firm policy which encompassed and approved of Zang's conduct.
3. Both Respondents pay back the portion of retained illegal fees to the Insurance Company and the excessive fees retained to the respective clients.

DATED this 28th day of October, 1984.

SPECIAL LOCAL ADMINISTRATIVE COMMITTEE S25

/s/ M. Jeremy Toles, Chairman
M. Jeremy Toles, Chairman

/s/ James M. Marlar
James M. Marlar

/s/ Dennis Wilenchek
Dennis Wilenchek

Special Local Administrative Committee S25 of the

State Bar of Arizona

In the Matter of the Members	Matters No.
of the State Bar of Arizona,	82-1-S25 82-7-S25 82-8-S25
STEPHEN M. ZANG and C. PETER WHITMER,	82-12-S25 82-13-S25 82-14-S25
Respondents.	83-2-S25 83-2-S25

OPINION OF FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

PROCEDURAL BACKGROUND

The Respondents, Stephen Zang and Peter Whitmer, were initially charged by formal complaint with numerous counts of ethical violations. There were various amendments and deletions to the pleadings, including a consent agreement relating to three of those counts. An evidentiary hearing was held, and the matter was submitted for decision.

GENERAL FACTS RELATING TO RESPONDENTS' PRACTICE

Respondent Stephen Zang graduated from Arizona State University Law School in 1973. Prior thereto, he had earned an M.D. degree from Stanford University, having graduated in 1968. He briefly practiced medicine and consulted on medical-legal matters out of state before returning to Arizona, where he and Respondent Whitmer formed the law firm of Zang and Whitmer.

Respondent Peter Whitmer graduated from Arizona State University Law School in 1970, and after four years in private

practice became a member of the Maricopa County Attorney's office in 1974, where he practiced criminal law for four years. His background also included expertise in the computer field, wherein he had worked as an analyst and programmer with General Electric for approximately five years.

The law firm of Zang and Whitmer began practice in 1979. The law firm was originally conceived by Zang and Whitmer as a personal injury law firm, from which conception they have not materially deviated. The Respondents envisioned a firm wherein the necessary administration and regulation of the practice was automated through the use of computer-generated forms, letters, requests for information, checklists, settlement brochures and similar documentation. The practice, while not expressly limited to smaller or more modest types of cases or amounts, nonetheless operated and continues to operate largely on a relatively small dollar, high volume basis, as opposed to a more selective, high-dollar practice sometimes associated with personal injury firms.

The firm of Zang and Whitmer employed several staff members, including paralegals, investigators, and others. The nature of the practice was highly structured, with a substantial amount of work being delegated to paralegals. The initial interviews, settlements, negotiations with insurance adjusters, and client communications were principally being handled by attorney Zang. The running of the office, researching of necessary legal points, preparation of pleadings, maintenance of the computer and computer-generated forms, and general administration was handled principally by Mr. Whitmer.

THE ADVERTISING COUNTS (Counts One, Two, Three and Eight

GENERAL BACKGROUND

Respondents have advertised the availability of their legal services through various means, and four of the charges of unethical conduct relate to those methods of advertising. The evidence contained numerous examples of advertisements placed by Respondents on television and in print.

COUNT ONE (UNAUTHORIZED ADVERTISING CONTENT)

The Third Amended Complaint alleges that Respondents made no application to the State Bar Association ("Bar" or "State Bar") to expand their advertising to include photographs, and that photographs are not included in those items authorized by DR 2-101(B). The Respondents are charged with violating DR 2-101(B) and (C), which provide:

> (B) In order to facilitate the process of informed selection of a lawyer by potential consumers of legal services, a lawyer may publish or broadcast the following information in print media distributed or over television or radio broadcast in the geographic area or areas in which the lawyer resides or maintains offices or in which a significant part of the lawyer's clientele resides, provided that the information disclosed by the lawyer in such publication or broadcast complies with DR 2-101(A), and is presented in a dignified manner:
>
> (1) Name, including name of law firm and names of professional associates; addresses and telephone numbers;
> (2) One or more fields of law in which the lawyer or law firm practices, a statement that practice is limited to one or more fields of law, or a statement that the lawyer or law firm specializes in a particular field of law practice, to the extent authorized under DR 2-105;
> (3) Date and place of birth;
> (4) Date and place of admission to the bar of state and federal courts;
> (5) Schools attended, with dates of graduation, degrees and other scholastic distinctions;
> (6) Public or quasi-public offices;
> (7) Military service;
> (8) Legal authorships;
> (9) Legal teaching positions;

(10) Memberships, offices, and committee assignments, in bar associations;
(11) Membership and offices in legal fraternities and legal societies;
(12) Technical and professional licenses;
(13) Memberships in scientific, technical and professional associations and societies;
(14) Foreign language ability;
(15) Names and addresses of bank references;
(16) With their written consent, names of clients regularly represented;
(17) Prepaid or group legal services programs in which the lawyer participates;
(18) Whether credit cards or other credit arrangements are accepted;
(19) Office and telephone answering service hours;
(20) Fee for an initial consultation;
(21) Availability upon request of a written schedule of fees and/or an estimate of the fee to be charged for specific services;
(22) Contingent fee rates subject to DR 2-106(C), provided that the statement discloses whether percentages are computed before or after deduction of costs;
(23) Range of fees for services, provided that the statement discloses, in print size equivalent to the largest print used in setting forth the fee information, that the specific fee within the range which will be charged will vary depending upon the particular matter to be handled for each client and that the client is entitled without obligation to an estimate of the fee within the range likely to be charged;
(24) Hourly rate, provided that the statement discloses, in print size at least equivalent to the largest print used in setting forth the fee information, that the total fee charged will depend upon the number of hours which must be de-

voted to the particular matter to be handled for each client and that the client is entitled without obligation to an estimate of the fee likely to be charged;

(25) Fixed fees for specific legal services, the description of which would not be misunderstood or be deceptive, provided that the statement discloses, in print size at least equivalent to the largest print used in setting forth the fee information, that the quoted fee will be available only to clients whose matters fall into the services described and that the client is entitled without obligation to an estimate of the fee likely to be charged.

(C) Any person desiring to expand the information authorized for disclosure in DR 2-101(B), or to provide for its dissemination through other forums may apply to the Committee on Rules of Professional Conduct of the State Bar of Arizona. Said Committee shall consider whether the proposal is necessary in light of the existing provisions of the Code, accords with standards of accuracy, reliability and truthfulness, and would facilitate the process of informed selection of lawyers by potential consumers of legal services; and following its consideration shall forward its recommendation to the Arizona Supreme Court. The relief granted in response to any such application shall be promulgated as an amendment to DR 2-101(B), universally applicable to all lawyers.

While it is true that photographs are not expressly provided as an acceptable method of advertising, the evidence established that the intention of the State Bar of Arizona was to authorize the use of photographs in print advertisements.[1] The rule expressly permits television advertising, which impliedly includes pictorial representations. Gary Stuart, Chairman of the State Bar Committee on Rules of Professional Conduct, and one of the draftsmen of the rule, testified that the rule was intended to permit the use of photographs, and that the use of photographs, *per se*, was not intended to constitute an ethical violation. No

evidence was presented to indicate that Respondents willfully violated the rule, or were acting in disregard of an ethical restriction clearly understood by others in the profession to be different than the interpretation placed upon the rule by Respondents and the drafters. Therefore, with respect to Count One, the Committee finds no ethical violation of the proscriptions of DR 2-101(B) and (C).

COUNT TWO (UNAUTHORIZED METHOD OF ADVERTISING [VAL-PAK COUPONS])

The Complaint alleged that Respondents distributed or caused to be distributed coupons advertising their services and offering free initial legal consultation along with similar commercial coupons of tradesmen and merchants, in a package of discount coupons called a "VAL-PAK." This occurred in April, 1980. The Complaint stated that the method of dissemination was not authorized by DR 2-101(B) and further, that Respondents made no application to the State Bar pursuant to DR 2-101(C) to permit this form of dissemination. Moreover, the Complaint charged that the method of advertising was misleading, in that it appeared to represent a discount offer, and was not primarily informative in nature, when in fact it did not offer a "discount" for legal services, although it was contained in a package with other advertising which did offer discounts.

The ethical violations charged are the same as in Count One.

The evidence established that the Respondents used the VAL-PAK mailing one time only, and that it was discontinued when the State Bar questioned its propriety.

The VAL-PAK stated that there would be no charge on personal injury interviews or accident cases, and that it implied that persons presenting the coupon were entitled to a free consultation. Presented in context with the other VAL-PAK distributions would lead an ordinary person to believe that the coupon had some value. Evidence established that, in fact, such practices are customary, even to non-advertising attorneys, and that attorneys seeking plaintiffs' personal injury contingent fee cases do not charge for initial consultation. Therefore, when presented together with discount coupons, there was an implied represen-

tation that the coupon advertisement contained something of value, when in fact it did not. Thus, a client or a perspective client would be lead to believe that this coupon was valuable, and that this was different than from the manner in which other attorneys handled it. In fact, it was a worthless coupon at best, and therefore misleading.

The Committee finds that the VAL-PAK advertising method was in violation of ethical proscriptions.

RECOMMENDATION: Censure for each attorney.

COUNT THREE (Misleading Advertising)

The heart of the Bar's advertising complaint against Respondents is found in the allegations of Count Three. The evolution of modern concepts of lawyer advertising began with the United States Supreme Court's pronouncements in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), a case arising from this jurisdiction. Since the *Bates* decision, the advertising of legal services has expanded, and become sophisticated and increasingly complex. In addition to *Bates*, courts have continued to touch upon the issue, including the United States Supreme Court in *In re R.M.J.*, 455 U.S. 191 (1982); *see generally*, "Advertising as Ground for Disciplining Attorney," 30 ALR 4th 742 (1984). The ethical rules which the State Bar contends the Respondents have breached are DR 2-101(A) and DR 1-102(A)(4). The former states:

> (A) A lawyer shall not, on behalf of himself, his partner, associate or any other lawyer affiliated with him or his firm, use or participate in the use of any form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim.

Related to this issue is an alleged violation of DR 1-102(A)(4):

> (A) A lawyer shall not:
>
> * * *
>
> (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

The essence of lawyer advertising is to "facilitate the process of informed selection of a lawyer by potential consumers of legal

services," DR 2-101(B), and to insure that meaningful information, useful to such consumer, is made available to persons who do not have detailed knowledge of lawyers or the work that they do.

The advertising for the availability of legal services must be, above all else, true, and not misleading, deceptive, fraudulent or false. The lay public must be able to rely upon the information which it receives from the legal community as being accurate, representative of the lawyers' current ability and willingness to perform, and true. A knowingly false communication is an ethical violation, and cause for sanction. The integrity of the profession, and the public's perception thereof, does not encourage knowing minor or technical violations, or violations which may not, arguably, be "material." The disciplinary rule does not discuss technical violations, nor does it impose a standard for determining whether a particular misrepresentation or falsehood is immaterial or "de minimus." The rule is unequivocal. It requires the communication of both helpful and true information. *See, also,* DR 2-101(C).

The Respondents admit that they caused the advertisements, which are in evidence, to be shown to the public or placed in print media. They admit that they produced the same, or reviewed it prior to its dissemination. No defense has been asserted that the Respondents were without knowledge of the advertising presented to the public.

The evidence presented to the Committee was voluminous, and it included expert testimony on both sides. Ultimately, the Committee was required to measure the content and message communicated by the advertisements, against the legal services delivered to the consumer by Respondents. The principal import of the vast majority of the advertisements delivered to the public was that the Respondents possessed an unusually high level of expertise and experience in personal injury law, which specifically included trial experience and were offering the full and rounded services to potential clients. The advertisements were laudatory, self-serving, and highly dramatic. Certain television advertisements, broadcast in 1982, portrayed Respondent Zang apparently arguing a case to a jury, while many of the printed adver-

tisements overtly associated the firm with actual courtroom experience and presentation. The advertisements presented Respondents as being complete personal injury lawyers, when in truth the Respondents acknowledged that they had negligible personal injury trial experience, and settled virtually all of their cases. In those rare instances when a case was not settled, the Respondents referred them to other lawyers, who were usually not associated with the firm during the time in question. As a result, the client, or consumer of legal services, was intentionally given the impression, through the advertising media chosen by Respondents, not only that Respondents were capable of preparing a case for settlement or trial, but that they were ready, willing and able, and in fact would try a case to conclusion on their behalf. In truth, while Respondents were actively promoting their firm as a firm with trial experience and possessed of judgment based upon actual personal injury trials and preparation therefor, they were not willing to undertake such trial tasks, and had little personal injury trial experience. (*See, e.g.*, TR. Vol. A, p. 56, 69). Therefore, their advertisements were false and misleading to the public.

The evidence showed that the Respondents were, had they chosen to be so, "ready" to take cases to trial. Their methods of gathering information, compiling it, discussing cases with witnesses, efficiently gathering facts, and other pre-trial preparation was capable. Moreover, had Respondents chosen to do so, they could undoubtedly have become experienced litigators, and their backgrounds and prior experience afforded them the tools with which to become able personal injury trial lawyers. However, by not having the benefit of that personal injury trial experience, and by a policy of specifically personally avoiding trial and then referring cases to others in those few instances where they were unable to obtain settlements, they evidenced an unwillingness to confront witnesses in an adversarial context and risk the uncertainties associated with any trial. Further, there was no practice to inform clients at the outset that if the matter were to go to trial it would be sent outside the firm to be handled by some attorney whose identity was yet unknown.

Were the Respondents' clients served or injured by that prac-

tice? There is insufficient evidence to determine if, in any specific instance, a client of the Respondents' firm suffered injury because of Respondents' unwillingness to try cases, by perhaps accepting settlements which might have been higher, had Respondents been known for their willingness and ability to try cases. Evidence before the Committee, presented by both the Bar and Respondents, differed on this issue. Nonetheless, the determination of injury to a client is not material if unethical conduct is found. The possibility is present that a client might, or could in the future, be injured by his or her reliance upon untrue advertising which portrays a law firm as having the experience and willingness to take cases to trial when the need arises. In no instance did the Respondents testify that they advised clients that, in the event a case must be taken to trial, they would refer the matter to lawyers not even associated with their firm. The clients had a right to expect and rely upon the representation that the attorneys who were advertising their services as personal injury trial lawyers, and who utilized dramatic symbols of conflict, courtrooms, one of their members arguing to a jury, confrontation and litigation in their advertising practice, would be prepared to handle their case, and try it to a judge or jury if necessary. As a result, a "Wizard of Oz" syndrome was created, that is, an ominous imposing and masterful impression was presented on a two-dimensional screen, when in reality, something less than what was represented was turning the dials on the computers behind the curtains.

Parenthetically, we do not, by this opinion, condone needless litigation when a just, fair and reasonable settlement may be obtained with the client's consent. Moreover, we recognize that every lawyer who has passed the bar examination of the State of Arizona, and who is licensed to practice in this State, is equally able to appear in court, before a judge or a jury, in a personal injury case. The State Bar of Arizona does not require special certification in order to do so. Thus, even the rawest and newest lawyer is under no impediment to try personal injury cases from the day he is sworn in, and he may also represent himself to the public as being licensed to practice before a court, and to try cases to courts and juries. The pitfall in Respondents' case, however,

is that while they represented themselves as having the willingness to try cases, they in fact scrupulously avoided it. In fact, Stephen Zang testified that while he was personally competent to prepare cases for trial, he was not competent to handle a personal injury case.

We do not believe that it is fair to the community at large, which is largely unfamiliar with the legal process, to assume that they are obtaining complete and experienced legal services when such are not, in fact, available to them. A client, when he chooses a lawyer through the advertising process, has a right to expect that the lawyer will be able and willing to act in the manner represented. In this case, it is clear that Respondents had no intention of taking a case personally to trial, and that express and implied representations of their courtroom abilities were false, misleading, and untruthful. As such, Respondents have violated DR 2-101(A) and DR 1-102(A)(4).

RECOMMENDATION: Six months suspension for each attorney to run concurrently with other suspensions.

COUNT EIGHT (Society Memberships)

Another advertising issue relates to Respondents' advertisements, and the use of appellations in correspondence with third parties, both legal and lay, that Respondent Zang was a fellow of both the American Academy of Forensic Sciences and of the American College of Legal Medicine. Most of the advertisements placed in print media by Respondents, including the VAL-PAK coupon mentioned in Count Three, contained references to those organizations.

The ethical violations charged are the same in Count Three, DR 2-101(A) and 1-102(A)(4).

At the time that such representations were placed in advertisements for legal services, Respondent Zang was not a current member of either of those organizations. It is evident that Respondents believed that reference to those organizations would have a favorable impact upon the lay public, in its search for meaningful information, which would enable it to locate counsel, and to better make an informed judgment as to which lawyer a person might choose to represent him. Respondent Zang

testified that he believed, at all times, that he was in fact a member of those organizations, even though his membership had lapsed several years before.

Respondent Zang's fellowship in the AAFS was terminated on October 6, 1977, and his fellowship in the ACLM was terminated on December 7, 1978. Pursuant to the rules of those organizations, Zang thus ceased to have any status with those organizations. When Mr. Zang was thus not a fellow of either organization when he claimed fellowship status in the 1980 advertisements and in subsequent letters generated by Zang and Whitmer. As such, the representations were false, untrue and misleading. These references to the organizations at no time referred to Respondent Zang's status as a "former" or "ex-" member. Indeed, DR 2-101(B)(13) expressly authorizes a lawyer to advertise his *membership* in scientific, technical and professional associations and societies. The falsity of the representations in print, by Respondents, was that it implied current and active membership and ongoing association with these societies, and was so intended by Respondents.

Mr. Zang's version that he believed that he was maintaining current membership in the organizations is not borne out by the evidence. His statements as to why he allegedly believed that he was still an active member of the organizations are inconsistent. He knew or should have known that he was required to pay annual dues; he joined on the basis of that information. He voluntarily allowed his membership to lapse. He was unable to satisfactorily explain how or why he continued to received literature from the organizations, and yet at one point allegedly instructed his bookkeeper to continue paying dues. When the mailings stopped, he did not ask his bookkeeper whether the dues had or had not been paid. Finally, after allegedly "learning" of his nonfellowship status in these organizations, he did not move to have his membership revived, but continued to hold himself out, at least through correspondence, as still being a current member of these organizations.

The written advertisements prominently display these memberships. Attorney Zang either knew or should have known, or had a duty to apprise himself of his status in each organiza-

tion, at a time when he was actively producing, editing and reviewing advertisements which would be submitted to the public, and which were intended by Respondents to convey meaningful information to consumers of legal services. Such care is required in order to protect the public from receiving false information. It is no defense to the ethical violation of falsehood that Respondent Zang had not lost those skills for initial membership in organizations to which he had been academically admitted and professionally sponsored, and that he still retained the academic qualifications required of any other member of that organization. The ethical violation lies in the willful, knowing or reckless disregard of truth, when making representations to the public, without making any apparent effort to verify the accuracy or currency of that information. The rules of truthful advertising of professional services do not permit such overt negligence.

Consequently, the Committee finds that Respondents Zang and Whitmer, through their advertising and the knowing, willful or reckless use of untrue information concerning Respondent Zang's membership in professional organizations, to which his membership had lapsed years before, was a violation of both DR 1-1022(A)(4) and DR 2-101(A).

Recommendation: Three months suspension for attorney Zang to run concurrently with other suspensions.

COUNT SIX (Lucien Smith Matter)

A. The Charges.

The Bar has charged Respondents with knowingly signing a settlement check of a deceased client, using a power of attorney which by law had expired upon the client's death. *See, Ariz. Rev. Stat.* § 14-5502 (1975). That act allegedly was in willful disregard of estate and probate settlement laws and procedures. The disciplinary rules which Respondents have allegedly violated are:

DR 1-102(A)(1), (4) AND (6), which state:

(A) A lawyer shall not:

(1) Violate a Disciplinary Rule.

* * *

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

* * *

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

and DR 7-102(A)(8):

(A) In his representation of a client, a lawyer shall not:

* * *

(8) Knowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule.

B. The Facts.

Lucien Smith was injured in an automobile accident, and hired Zang and Whitmer to represent him. From time to time, while negotiations proceeded on the claim, Mr.Smith would drop in to Respondents' law office, and engage Respondent Zang in conversations. During those conversations, he advised Zang of an unrelated cancerous condition and its status.

On April 27, 1981, Smith was hospitalized for cancer treatment. At that time, no settlement had been reached on behalf of Mr. Smith. Upon learning of the hospitalization, Zang caused a power of attorney to be drafted and sent to Mr. Smith in the hospital. On May 4, 1981, this power of attorney was executed by Mr. Smith, and authorized the firm of Zang and Whitmer to settle the matter and also to sign settlement drafts.

Mr. Smith died on May 13, 1981, and three days later Zang and Whitmer received a settlement draft from the insurance company which had been prepared on May 12, 1981, one day before Mr. Smith's death. It is clear that the settlement agreement and amount of the settlement had been reached prior to the death of Mr. Smith, and was therefore binding upon the parties.

On May 14, 1981, Kathy Johnson, daughter of Lucien Smith, who had taken on the task of monitoring the case and communicating with the law firm on behalf of the family, called the firm. She recalled that she was emotionally strained and upset at the time, and that she left word that her father had died.

Esther Adams testified that Zang told her to instruct the daughter, Kathy Johnson, to give notice of her father's death, if it occurred, by indirect means (in the form of a "code") which

would not specifically state that he had died. Mrs. Johnson did not recall whether she spoke specifically with an attorney of the firm or not. Esther Adams, a paralegal employed by the firm, testified that when Kathy Johnson called she was crying and upset, and that Adams assumed that the father had died and then transferred the call to Mr. Zang. She did not hear the conversation between Kathy Johnson and Mr. Zang.

Esther Adams further testified that after she received the phone call from Kathy Johnson, which she interpreted as a notice to her that Smith had died, she later discussed the case with Mr. Zang. According to Adams, he said that they had "just gotten in under the wire."

Mr. Zang testified that he did not know that Lucien Smith had died on the date of the phone call of May 14, 1981, nor did he know that Lucien Smith had died even as late as May 19, 1981. There is no direct evidence which indicates that Zang had actual knowledge of the death as late as May 19, whether by "code" or other statement.

Mr. Zang testified that he did not know that the power of attorney which had been executed would expire upon Mr. Smith's death, but that he assumed that he was using the form in his office which allowed for a power of attorney which continued after death, in any event.

On or about May 16, 1981, Zang and Whitmer received the May 12 settlement draft. It was made payable to both Lucien and Beryl Smith, and the firm. Esther Adams' log reflects that Mr. Zang told her to contact "Mr. and Mrs. Smith" in order to come in and receive the settlement proceeds.

Smith's widow, Beryl, visited the law offices of Zang and Whitmer on May 19, 1981, in order to receive the settlement distribution. She was crying and discussed the death and funeral with Esther Adams. There is no evidence that Mrs. Smith met with any attorney on that date.

Esther Adams also testified that prior to the settlement draft being endorsed, by use of the power of attorney, she had discussed the funeral with Stephen Zang.

Mr. Zang endorsed the back of the insurance draft, and Peter Whitmer endorsed on behalf of Mr. Smith by means of the special

power of attorney on May 19. Zang and Whitmer executed its check, payable to Beryl Smith only, from the firm's trust account, without designating Lucien Smith as a payee. No one disputes that the settlement proceeds were distributed in accordance with the law, and that no injury has occurred to any third party.

C. The Conclusion.

The settlement on behalf of Lucien Smith was agreed to and the case actually settled before Mr. Smith's death. It was done with a power of attorney and done with Mr. Smith's consent. He was concerned about obtaining a settlement before he died so that his wife could purchase a mobile home from the proceeds.

From all of the circumstances, we are not convinced by the force of the evidence and with the recollection of memories that there is clear and convincing evidence to prove knowledge of Smith's death by Respondent Zang. Thus, we cannot find that Mr. Zang knew that Lucien Smith was dead at the time that he executed the settlement draft, and caused the power of attorney to be signed by Mr. Whitmer, and a trust check to be issued to Beryl Smith.

Since the Committee is charged with a higher duty than to base its findings on mere suspicion or speculation, we therefore find that no ethical violations occurred with respect to the Lucien Smith matter.

COUNT NINE (Failure to Subrogate)

A. The Charge

Respondents were entrusted with the personal injury case of client Betty Daniels. The complaint charges that Respondents settled property damage claims with both their client's insurance carrier and with the third party's insurance carrier, and then refused to allow subrogation in accordance with the provisions of the insurance policies involved. The following disciplinary rules were allegedly violated:

DR 1-102(A)(4) and (6):

(A) A lawyer shall not:

* * *

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

* * *

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

DR 7-102(A)(2), (A)(3) and (A)(7):

In his representation of a client, a lawyer shall not:

* * *

(2) Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.

(3) Conceal or knowingly fail to disclose that which he is required by law to reveal.

* * *

(7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.

The Bar alleges that attorney Zang wrongfully settled Ms. Daniels' claim for property damage, twice. Moreover, that the firm failed to take any steps to cure or remedy that problem, and by so doing, knowingly interfered with Ms. Daniels' carrier's (State Farm's) right of subrogation with respect to the property damage claim which State Farm had previously paid. It is further alleged that execution of a general release of all claims prejudiced the right of State Farm to subrogate, as a matter of law, and that these results were known or should have been known by Stephen Zang and by the firm of Zang and Whitmer. It is contended that the knowing and willful disregard and breach of the client's written contract with her insurance company was encouraged by Zang and Whitmer, and that their conduct in so doing was unethical.

B. The Facts.

On April 4, 1981, Betty Daniels was injured and incurred property damage, when her Ford Maverick was struck by a vehicle driven by Manuel Jaramillo. Betty Daniels had a collision insurance policy with State Farm Insurance, and Mr. Jaramillo carried liability insurance through Equitable Insurance Company. The firm of Zang and Whitmer was retained by Betty Daniels to handle her case.

Respondent Zang negotiated the property damage portion of

client Betty Daniels' claim with both insurance companies under both the first-party and third-party coverage, and effected a settlement with both companies.

In letters written by State Farm to Zang on April 13, 1981, April 20, 1981, and May 18, 1981, prior to ultimate settlement with either company, State Farm indicated its desire to subrogate.

On June 26, 1981, Ms. Daniels' carrier, State Farm, executed a check in the amount of $1,400.00 to Ms. Daniels in payment and settlement of her property damage claim (less the applicable deductible).[2] Thereafter, on July 21, 1981, Equitable General Insurance Company, Mr. Jaramillo's carrier, "in payment of any and all claims," submitted its check to Betty Daniels, through Zang and Whitmer, for the sum of $3,900.00.

On July 27, 1981, Ms. Daniels signed a release in payment of any and all claims, including therein "all known and unknown, foreseen and unforeseen bodily and personal injuries and property damages and the consequences thereof resulting or to result from the accident, casualty or event which occurred on the 4th day of April, 1981. . . ." Zang's signature was also placed on the release. The firm deducted a fee from both checks, and remitted the balance to the client. Upon distribution of the funds, the firm took its one-third contingency fee from the property damage settlement that its client had received from State Farm, and the firm also took a one-third fee from the total settlement obtained from Equitable.

Following Zang's settlement with Equitable on or about July 27, 1981, State Farm determined that Equitable's settlement had included property damage, and, by letter dated August 10, 1981, State Farm apprised Zang of the double settlement. State Farm made demand for a reimbursement payment, pursuant to its rights of subrogation, in an amount to be determined when the salvage was sold. Zang never responded.

State Farm's file, however, indicates that it had made a decision on July 16, 1981, to waive any rights of subrogation against Equitable because of the possible contributory negligence on the part of its insured, Betty Daniels. No evidence exists that this information was conveyed to Zang and Whitmer prior to the initiation of these proceedings.

C. Conclusion.

The only real issue presented in connection with this Count is whether Respondent Zang knew that he had settled with Equitable for property damage, collected twice for the same item precluding State Farm from asserting its subrogation rights, and whether his subsequent refusal to attempt to reimburse State Farm, taken together, constitute an ethical violation.

It is Mr. Zang's position that the settlement with Equitable dealt only with bodily injury. However, the Equitable file contains a demand letter stating that in the event it paid the property damage claim, it would require the title and lien release so that it could obtain the salvage value of the automobile; however, at no time did Equitable ever make any further effort to obtain title to the car for salvage value purposes. Moreover, the release signed by Zang and his client was for claims for both property damage and physical injury, and the draft read that it was in payment of "any and all claims."

The Committee finds that the release, given by Zang and his client to Equitable, necessarily defeated or prejudiced the subrogation right of State Farm against Equitable and its insured, and that Zang knew it, both because of his familiarity with personal injury release practices, the prior communications from State Farm, and the language of the Equitable release which he and his client signed.

The fact that State Farm may have, at one time, internally determined not to subrogate for other reasons was not a fact shown to have been known to Respondent Zang at the time the release was signed or afterward. Such is immaterial in any event, since, upon receiving notice of the complete settlement with Equitable, State Farm had not notified Zang or Daniels nor changed its position with regard to Ms. Daniels and its asserted subrogation rights, and its demand for subrogation was consistent with its earlier position.

The Committee finds that Zang did know that he was settling more than just a bodily injury claim with Equitable and that by tendering a full release of claims he knew that he was prejudicing State Farm's subrogation right. As a result, Zang assisted his client in collecting twice for the same property damage, and

refused, on behalf of his client, to entertain any effort to reimburse State Farm, in violation of its known contractual rights. Such conduct constitutes a violation of the disciplinary rules with which he is charged.

Recommendation: One year suspension for Respondent Zang to run concurrently with other suspensions.

Dissent by Jeremy Toles

The crux of the matter is: Did Mr. Zang knowingly enter into a settlement with Equitable for all claims in derogation of his client's insurance company's right to subrogate for property damage?

I do not find by clear and convincing evidence that Zang intended to or did settle with Equitable for property damage in addition to the personal injury damage claim. His communications with Equitable on the property damage was last memorialized in a June 22 letter from Equitable offering to settle the property damage for $765.00. Zang then turned his attention to settling, under the first party coverage, with State Farm for a total of $1,400.00, which is exclusive of the $100.00 deductible. So in effect, there was a settlement for damage to the car of $1,500.00 minus the deductible.

I cannot presume from the evidence he would later settle both the property damage claim and the personal injury claim with Equitable for approximately $700.00 less than he had gotten from State Farm. As the record discloses that he was fully aware of what he thought the value of the car was and was trying to get the best settlement for his client. Further, Equitable never asked for any salvage value on the car nor are there any notes or notations dealing with that subject, either in Equitable's file or Zang's file. This would seem strange if Equitable had settled for the property damage just as State Farm did, they likely would have required some assignment of title or something of that nature. So the record is void of any follow through by Equitable to capture a salvage value on what is acknowledged to be a total loss vehicle.

It is more likely, in my opinion, that the release was a standard form calling for release of all claims and that Zang overlooked the property settlement issue as it related to the release. At most, this can be said to be negligence not neglect of a client's matter and any remedies would fall within the civil arena, but do not constitute an ethical violation.

I note also that while State Farm has claimed that he did something in derogation of their rights, they did not pursue this matter to arbitration between themselves and Equitable, at which time Zang would have been available to testify that there was no settlement of property damage.

We are faced in this case with the fact that there were no witnesses from Equitable (specifically the adjuster who settled the case with Zang, was not present to testify) only the bare claim file. One troubling thing is Zang's apparent refusal or non-response to State Farm's letters where they suggested that he had done a double recovery. I find this conduct to be certainly discourteous but he was under no obligation to respond to them.

COUNT TEN (Insurance Company Error)

A. The Charges.

The Bar alleges that Respondents were dishonest in accepting, as part of a personal injury settlement, monies which they knew to have been tendered in error by the insurance company, or, when advised of the error, that they refused to return the money or assist in obtaining such return.

The disciplinary rules which Respondents allegedly violated are:

DR 1-102(A)(4) and (A)(6):

(A) A lawyer shall not:

* * *

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

* * *

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

DR 7-102(A)(2), (A)(3) and (A)(7):

(A) In his representation of a client, a lawyer shall not:

(2) Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.

(3) Conceal or knowingly fail to disclose that which he is required by law to reveal.

(7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.

B. The Facts.

Rebecca Drummond sustained injuries resulting from an automobile collision with William Bryan on January 12, 1981. Both Ms. Drummond and William Bryan were insured by State Farm. Zang and Whitmer was engaged to represent Ms. Drummond. However, prior to retaining Zang and Whitmer, State Farm had offered Ms. Drummond $1,100 in settlement of the property damage to the automobile, but this offer had not been accepted.

Zang communicated with State Farm and on February 9, 1981, State Farm advised him of the outstanding offer for the property damage. It is unclear whether the settlement was offered under the first-party coverage of Ms. Drummond or the third-party coverage of Mr. Bryan. However, there was no apparent mention of the fact that there was a $100.00 deductible on the collision loss, which leads to the conclusion that the offer was based upon the third-party coverage.

Mr. Zang claims there was a dispute over the manner in which the property damage claim was to be paid. He did acknowledge there was no dispute over the sum of $1,100.00 that was offered by State Farm. Mr. Zang contended that he spent time arguing with the insurance company as to whether the $1,100.00 would be paid under the first-party or third- party coverage. We do not find that credible based on the evidence. Nor does it appear from

any records that there was any dispute as to the manner in which this payment would be charged.

Thereafter, during subsequent negotiations with the State Farm adjuster, Mr. Zang was concerned with the bodily injury portion of the Drummond claim, which related to the third-party coverage.

The case log of the State Farm adjuster, Francene Adcock, shows that the negotiations began with Drummond's demand for $8,000.00. After receiving authority from her company to settle for $3,000.00, Mrs. Adcock responded on May 11, 1981, and offered $2,000.00 for the bodily injury portion of the claim. That log further indicates that at that time in the negotiations Mr. Zang then reduced his demand to $3,500.00, and also states that Zang felt he could not go any lower. Ms. Adcock's log further reflects she was authorized to settle for $3,000.00 and discussed with Zang a settlement range between $2,400.00 and $3,000.00. Adcock testified that Zang reduced the personal injury offer to $3,500.00. Mr. Zang, however, contends that he never dropped his demand below $6,000.00, and cites his later filing of suit, and a corresponding settlement letter setting forth that amount as corroboration, and that he "remained" willing to settle for $6,000.00.

After a period of time in which nothing significant occurred with regard to the deadlock in negotiations, Ms. Adcock internally requested authority to settle the case for a total of $4,500.00 ($3,400.00 for the bodily injury claim and $1,100.00 for property damage). She received that authority on June 30, 1981.

Mr. Zang, meanwhile, also trying to break the deadlock, on July 2, 1981, filed a lawsuit and wrote State Farm a letter offering to dismiss the case in consideration for a payment of $6,000.00.

During the settlement negotiations, an error occurred when Adcock reviewed the wrong file, *i.e.* the William Bryan file, and saw that the policy also included medical payments coverage. She mistakenly believed that the med-pay was available to Ms. Drummond under Ms. Drummond's first party coverage. Upon discovering this apparent oversight, she immediately caused the issuance of a draft for the payment of submitted Drummond

medical bills, which she believed were legally owing under the med-pay insurance contract in the amount of $1,295.05. Under a first-party medical payments policy, which Adcock believed Drummond had, the insured is entitled to reimbursement for medical bills incurred as the result of an accident, without regard to fault. Zang had previously submitted Drummond's bills as part of Drummond's claim for bodily injury. A State Farm draft, in the amount of $1,295.05, was mailed to Zang on July 6, 1981, under separate cover, and included therewith was a transmittal letter identifying it as being for medical payments coverage, and requested that the medical providers be paid. This amount was in no way, on its face, related to the liability coverage.

By letter of July 7, 1981, Adcock attempted to induce settlement under the Bryan third-party liability policy, by sending what Mr. Zang termed a "drop draft," that is, a State Farm draft, for the total sum of $4,500.00 in full settlement of all claims including bodily injury and property damage.

This July 7 offer was consistent, less $100.00, with Adcock's understanding of Zang's counteroffer of $3,500.00 and with the property damage sum of $1,100.00 previously discussed. However, according to Adcock, Zang had previously stated he could not go below $3,500.00 for the bodily injury. This total offer then varied by $100.00. This draft and its accompanying documents were not discussed by Zang and Adcock prior to State Farm's mailing thereof.

Negotiations continued and on July 21, 1981, Adcock wrote to Zang advising that she could not settle the case for the "additional $500.00" Zang had apparently orally requested as a compromise. It is unclear from the letter as to what the $500.00 was considered to be in addition to. The negotiations deadlocked again. We construe that the "$500 more" related to the $4,500.00 drop offer, since if it is construed to be related to the $5,795.05 that Mr. Zang then had in hand, but had not yet cashed, it would have taken his demand for settlement over the amount which he had offered by his letter of July 2, 1981, or $6,000.00, in order to settle the lawsuit.

Therefore, at this point in time, Mr. Zang had in his possession a med-pay check ostensibly issued under a med-pay provision

in the Drummond contract, in the amount of $1,295.05, plus the $4,500.00 settlement draft for bodily injury and property damage in the amounts of $3,400.00 and $1,100.00, respectively.

There was included with the check sent for medical pay coverage a transmittal form which indicated that the $1,295.05 was for medical pay coverage. At no time had Mr. Zang ever requested med-pay coverage on behalf of his client. Moreover, he did not undertake to represent the client on the med-pay coverage, as he did by letter to Betty Daniels in her case. The med-pay draft was payable only to "Rebecca Drummond," and did not include Zang or the firm as a payee, and stated that the insured was Roger Drummond. The transmittal letter indicated how the figure was arrived at, that is, all medical bills were itemized to the penny.

The $4,500.00 settlement offer was payable to Roger and Rebecca Drummond and Zang as attorney, jointly, and it indicated that it was made under third-party coverage since the insured was identified as William Bryan.

Zang testified that, after receipt of both checks, he met with the clients, but that they had rejected the total offer of $5,795.05 (Tr. Vol. 4, p. 215). Obviously, sometime later, that settlement was accepted. At that meeting, med-pay was not discussed. Further, at that time, Zang did not negotiate the med-pay draft at all, even though it would have had no effect on the settlement of the adverse liability claim. When the settlement was finally made, Zang endorsed both drafts, had his clients sign both drafts, took a one-third fee from each of the two drafts and disbursed the remaining money to Ms. Drummond and her medical providers. He also dismissed the suit.

On July 28, 1981, Adcock discovered her mistake regarding the med-pay and telephoned Zang to confirm the error. Zang, in acknowledging the mistake and hoping to rectify it, told her that the $1,295.05 had provided the added incentive for him to settle the case and, together with the $4,500.00 drop draft, was close to his $6,000.00 offer, and he refused to return the money. He also refused to send the one-third he had retained as his fee from the mistaken payment. Later, several items of correspondence were sent to Mr. Zang by members of State Farm's Claims Department, including a letter dated August 12, 1981. Mr. Zang was re-

quested to return the med-pay money, and was again notified of the unilateral error. There was an offer by State Farm to return the release to Mr. Zang and to renegotiate their settlement or litigate if necessary, the bodily injury claim. This is contrary to what Mr. Zang testified. He testified that he was the one who proposed that the release be returned and that the bodily injury portion be renegotiated, but that proposal was rejected by State Farm.

On August 18, 1981, Mr. Zang rejected the suggestions to return any money or to renegotiate the claim and advised State Farm that the money had been disbursed to his client and that he was not willing to return any portion. In addition, Mr. Zang did not reveal that he had retained a one-third of the mistaken payment as a contingent fee, nor did he at least offer to return payment of that Sum. State Farm elected not to pursue the return of the money against the insured or Mr. Zang.

Zang did not inform his clients of the mistake (TR. Vol. 4, p. 258), in order that they might have the option to return money obtained by them by virtue of another's error.

C. Conclusion.

Did Zang know that his clients were not entitled to medical payments under a separate first-party policy, and that such money tendered by mistake would unjustly enrich his clients? Did knowing acceptance of sums clearly drawn against a nonexistent policy constitute an ethical violation? Did Zang have an ethical obligation to return or make an effort to return those monies, or draw the mistake to the attention of his clients and the insurance company before said sums were negotiated? After Zang acknowledged the mistake on August 18, 1981, did he have an ethical obligation to return at least that portion of his fee taken directly from the mistakenly paid monies? We find that the answers to all of these questions must be answered in the affirmative.

The Committee finds that Mr.Zang knew of State Farm's error before he negotiated the Drummond drafts, and that even if he had increased his demand to $6,000.00 by the form letter sent after the filing of the lawsuit, he immediately reduced his demand, post-filing, to a total of $4,000.00 for the personal injury

claim, which was $500.00 above the $3,500.00 that we find he had made before, plus the $1,100.00 in property damage, for a total post-filing demand of $5,100.00. It is also our finding that Mr. Zang had, in the early negotiations made an offer of $3,500.00. It is interesting to note that the letter which sent the med-pay draft transmittal (Exhibit 43) broke down the sum of $1,295.05 by the amounts owed to various doctors, and expressly requested that Mr. Zang distribute it to medical providers. Mr. Zang's position on this is that the reason that he was not alerted to the error when he saw the separate $1,295.05 draft was because he suspected that it was "just another dirty trick by Francene Adcock." Such suspicion had to mean that he had knowledge that it was sent in the *form* of med-pay in order for him to infer that it was a dirty trick, when in fact it was intended, in his view, as part of the overall third-party liability and property damage claims. Thus, he knew that it could not be med-pay, and that his clients were not entitled to it.

Ethical practice dictates that such an "ambiguity" be affirmatively resolved, rather than by attempting to unjustly capitalize on what clearly appeared on its face to be, and what turned out to be, an obvious error. To unhesitatingly and unquestioningly conclude that the "dirty trick," creating a settlement pool larger than that which was ever actually sought, creates an impression of the professional attorney as one who can and will take advantage of other persons' errors at all costs, and who will attempt to capitalize on those errors. Such conduct is unethical. Equally reprehensible is that, when the error was discovered and acknowledged, Zang and Whitmer refused to return even that portion of the $1,295.05 mistaken payment upon which they had taken a fee. Moreover, the client was not even given the opportunity to voluntarily return the money, had she chosen to do so. While the client may have justifiably and legally relied on the insurance company's unilateral error, she nonetheless may have chosen to voluntarily return funds received in error, and should have been advised of the mistake and offered the choice.

In this Committee's opinion, the unethical conduct consisted in tendering the medical payment coverage funds to his client without disclosing or attempting to correct the error, and pos-

sibly subjecting his client to potential litigation, partly to preserve his fee. This was a conflict of interest. Respondent Zang's conduct in knowingly accepting a tender of funds which he knew to have been mistakenly received, and thereafter converting it to his client's use and recovering a fee on this sum, constituted conduct involving dishonesty, fraud and deceit as proscribed by DR 1-102(A)(4). Such conduct reflects adversely on his fitness to practice law under DR 1-102(A)(6). The Committee finds that he also violated DR 7-102(A)(2) and (A)(7).

It is the Committee's opinion, in addition to its other recommendations, that Mr. Zang should be ordered to make restitution to State Farm Insurance for the mistaken payment of $1,295.05, which he knew his client was not entitled to receive, together with interest thereon at 10% per annum from July 28, 1981, until paid, and that payment of the same be a condition of reinstatement.

Recommendation: One-year suspension for Respondent Zang to run concurrently with other suspensions.

COUNT ELEVEN (Excessive Fees)

Count Eleven deals with subject matter covered in Counts Nine (Betty Daniels) and Ten (Rebecca Drummond). Count Eleven alleges that Respondents received an excessive fee in both cases. The rule allegedly violated states:

DR 2-106.

(A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

(B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will

preclude other employment by the lawyer.

(3) The fee customarily charged in the locality for similar legal services.

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or by the circumstances.

(6) The nature and length of the professional relationship with the client.

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

(8) Whether the fee is fixed or contingent.

(C) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case.

The Committee finds that excessive fees were charged in both cases.

A. The Betty Daniels Case.

Betty Daniels had med-pay coverage under her policy with State Farm, in addition to property damage coverage. Zang wrote State Farm, on behalf of Betty Daniels, on April 8, 1981, and informed them that the firm would be representing Betty Daniels in connection with the medical payments claim. The only other letter was dated July 9th and it demanded payment for the medical coverage and enclosed supporting medical bills and records. State Farm immediately responded to this demand and on July 13, it executed a draft for medical payments. Copies would be delivered to Mr. Zang. Mr. Zang's position was that he had expended extraordinary efforts in preparing and obtaining the payment. He claimed that he had spent considerable time and effort arranging for a medical doctor to treat Ms. Daniels, who would not seek immediate payment. The Committee feels that this properly falls within the scope of the representation on the personal injury claim. Further, there is no showing that such doctor, being secured with both med-pay coverage as well as an assignment of any liability settlement funds, would not have represented or treated Betty Daniels. This matter simply does not bear

on any extraordinary effort in order to collect the undisputed first party med-pay coverage.

There is a further claim that the firm's own employee, Esther Adams, for the reason for internal dissention within his firm, had caused State Farm to refuse to make medial payments until Betty Daniels had received an independent medical examination (IME). A thorough review of the file testimony does not disclose this to be true. A letter from State Farm to Zang, dated July 15, 1981, scheduled the IME for July 31. State Farm did not even schedule the IME until after it had executed the July 13, 1981, med-pay draft to Zang. It was not withholding payments contingent on the IME. Further, the file reflects that as soon as State Farm was informed by Esther Adams that the client was no longer treating, it cancelled the IME in order, presumably, to save costs for themselves. Mr. Zang also stated that he had made various unsuccessful demands upon State Farm for med-pay prior to the July 9th letter. However, there was no documentary support of this testimony, and further, there was no showing that State Farm had collected, nor had it been sent by Zang or anyone else any of the medical bills prior to July 9th. Moreover, the letter from the treating physician was not dated until June 30, 1981. Therefore, there probably or reasonably would not have been any demands for med-pay prior to the doctor's bill of June 30 being received by Zang.

Mr. Whitmer generally disagreed with Zang's testimony, saying that there was different routine as to the med-pay within the office. Whitmer said the firm policy and practice was to orally inform new clients that medical payments could be handled without the assistance of an attorney. There is no evidence that the clients were informed of the practice in the community for attorneys not taking fees on first party coverage. If the client nonetheless wished to have Zang and Whitmer handle the matters, the language of the fee agreement was broad enough to cover the med-pay that was procured. This oral discussion of med-pay was followed by a letter which confirmed that Zang and Whitmer would seek recovery under the med-pay portions of the client's insurance policy. Mr. Whitmer testified that the firm retained a one-third fee for medical payments secured on behalf of all

clients which requested their aid, and that as far as the firm was concerned, this written confirmation letter did not constitute a binding contract. According to Whitmer, the client was free to back out of the agreement at any time. We note although the client was never informed of this generous arrangement, and that the burden was on the client to first object to the fee in order to enforce the alleged rights of which he had never been informed. In addition, according to Mr. Zang, the firm made an independent determination on each case, at the time of the distribution, as to whether retention of the fee from the medical payments coverage would be just and reasonable.

If, in fact, Mr. Zang made an independent determination at the time of the payment of the one-third fee then he certainly should have known that his fee was excessive in Betty Daniels' case. The evidence shows it is customary that the lawyers in the Phoenix area do not charge one-third contingent fee on routine first party medical payment recoveries, barring some special arrangement or special problem or denial of a particular claim. Absent unusual circumstances, such claims are not contingent on the outcome, but on contract right.

The Committee finds that in addressing the various factors presented within DR 2-106, the evidence supports the finding that with respect to Respondent Zang's activities in connection with Betty Daniels' case, that:

(A) Minimal time and labor were expended in procuring Betty Daniels' medical payments coverage and the task presented no novel or difficult questions;

B. Representing Betty Daniels on her medical payments claim did not prevent Respondents from accepting employment from other clients;

C. Lawyers in the Phoenix area do not customarily charge contingent fees on routine first-party medical payment recoveries based on contract;

D. There was nothing unusual about the amount or results of the medical payments recovery that would justify a one-third contingency fee;

E. The claim was paid shortly after submitted and imposed no unusual time limitations upon Respondent's recovery of Ms.

Daniels' medical expenses, nor did State Farm's handling place undue pressure on the Respondents;

F. No unique relationship existed with Betty Daniels;

G. The Respondents had no extraordinary reputation to justify taking a one-third contingency fee for the work performed;

H. No contingent fee should have been taken since there appeared to be no risk taken, and collection amounted to nothing more than would appear to be routine processing of medical payments coverage.

B. The Rebecca Drummond case.

Rebecca Drummond was initially offered $1,100.00 in payment in her property damage claim, before Zang and Whitmer were retained. Zang was notified of this prior offer by letters of February 9, 1981 and March 3, 1981. When Zang was retained, there was no substantive work done on the $1,100.00 claim. Further, State Farm took the initiative on February 9, when it wrote Mr. Zang a letter and advised him that it had made an offer which had not yet been accepted or rejected. On March 3, 1981, Mr. Zang was again reminded that this offer was outstanding and acceptance was invited. Therefore, it is clear from the evidence that State Farm was ready, willing and able to pay Mrs. Drummond the amount of the property damage settlement, but the offer was not accepted, nor was it shown that the client was given the opportunity to either accept or reject that particular claim, nor that she was even told about its status. Negotiations continued only on the bodily injury portions of the claim.

It appears that Zang's representation did nothing but delay, for months, the claim of $1,100.00, less his one-third fee which he did not earn.

It is interesting to note that Mr. Zang testified that he fought with State Farm over whether the property damage would be paid under first-party or third-party coverage. Since $1,100.00 was the apparent amount which was paid for the property damage but did not include a deductible, we must conclude that it was paid under the third-party coverage. The fee actually taken was three times the amount which was saved.

There are no notes in the State Farm file or from testimony

from Adcock that there was any discussion or confusion about the $1,100.00 payment as being by either first- or third-party carrier.

The testimony produced also evidences that Respondents receive a contingent fee out of the proceeds sent by State Farm Insurance Company mistakenly for medical expenses as previously found by the Committee, in its findings in Count Ten, above.

Based upon these findings, the Committee finds that with respect to this Count, Respondent Zang knew or should have known that an error by the insurance company had been committed in medical payments' proceeds when in fact his client had no such coverage. Even after obtaining knowledge of this mistake by the insurance company, Respondent Zang never offered to refund even that portion of the payment upon which he took as his fee, and the Committee finds that the retention by Respondent Zang of this sum, even after knowledge of the mistake, constitutes the collection of an illegal fee as proscribed by DR 2-106(A).

C. Conclusions.

The Committee finds, in both the Drummond case and the Daniels case, that Respondent Zang violated DR 2-106(A) which provides that a lawyer shall not enter into an agreement for, nor charge or collect an illegal or clearly excessive fee. The Committee concludes that Respondent Zang further, although rendering some assistance to his clients in these matters relative to the recovery of their claims, charges excessive fees. The Committee further concludes, after a thorough review of the evidence, that Respondent Whitmer was not directly involved with either the Daniels or Drummonds cases, and apparently had no direct participation therein. However, by his own admissions, the fees collected in those matters were collected pursuant to a policy or a practice in the firm which charged said fees. It is incongruous that both Respondents take a position that their practice of settling cases, and in taking small cases which other attorneys would not be interested in handling, constitutes a service to the public which is not otherwise available or offered. They further justify this practice by claiming that they handle many small

claims and do a professional job even though the case is small, and which would otherwise not receive attention elsewhere. In fact, the people with smaller cases who are attracted to their law firm by advertising are charged more, in reality, than other clients throughout the community, as the fee pertains to collection of first-party coverage.

The Committee further concludes that Respondent Whitmer's participation in the firm's policy of establishing fee agreements which are misleading to the general public, by the omission of important information, fails to provide that the information necessary by a client can decide whether he desires Respondents Zang and Whitmer to proceed on first-party coverage claims on a contingent fee basis. Respondents then put the burden upon that client to specifically point out to Respondents that he does not wish to be obligated to a contingent fee even though not so advised initially. The Committee further notes that Respondents have continually maintained throughout these disciplinary proceedings that the purpose of their practice was to provide a service to persons with small claims; that the standard fee agreement provides that upon the filing of a lawsuit on claims under $10,000, the contingency fee goes from one-third to 40% of all amounts recovered, which includes first-party coverage as well as recovery under third-party coverage. Although Mr. Zang testified that they do not take 40% of those recoveries, the Committee finds that the potential for abuse, even if Mr. Zang is correct, exists. Ultimately, the people who suffer are those with small claims who could obtain the same service elsewhere without losing one-third of the value of their property damage or medical payments claims, upon which no dispute as to payment exists.

Recommendation:

1. Respondent Zang be suspended for one year concurrent with other suspensions.
2. Respondent Whitmer to be censured for his participation in a firm policy which encompassed and approved of Zang's conduct.
3. Both Respondents pay back the portion of retained il-

legal fees to the Insurance Company and the excessive fees retained to the respective clients.

Footnotes

1. In view of the intent and established practice relating to photographs, the Committee recommends an amendment to the rule to expressly allow the use of photographs.

2. Parenthetically, as will be discussed in a later portion of this opinion [Count Eleven], State Farm Insurance, on July 13, 1981, also issued its check in the amount of $775.50, relating to the medical payments portion of Ms. Daniels policy.

Appendix D

Order of the Supreme Court of Arizona Denying the Petitioner's Motion for Rehearing

Issued on September 16, 1987

Supreme Court

DAVID R. COLE
CLERK

STATE OF ARIZONA

DIANA K. BENTLEY
CHIEF DEPUTY CLERK

201 WEST WING STATE CAPITOL
1700 WEST WASHINGTON
PHOENIX, ARIZONA 85007-2866

TELEPHONE (602) 255-4536

September 16, 1987

RE: **In the Matter of STEPHEN M. ZANG and C. PETER WHITMER**
Supreme Court No. SB-86-0014-D
State Bar No. 82-1-S25, 82-7-S25, 82-8-S25, 82-9-S25, 82-12-S25, 82-13-S25, 82-14-S25, 83-1-S25, 83-2-S25, and 83-3-S25

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on September 15, 1987, in regard to the above-referenced cause:

ORDERED: Motion for Reconsideration = DENIED.

Justice Moeller recused himself and did not participate in the determination of this matter.

Mandate Order enclosed.

DAVID R. COLE, Clerk

Appendix E

Mandate of the Supreme Court of Arizona
Issued on September 16, 1987

Supreme Court of Arizona

IN THE MATTER OF	
	Supreme Court No. SB-86-0014-D
STEPHEN M. ZANG and C. PETER WHITMER,	
	Disciplinary Commission Nos. 82-1-S25, 82-7-S25, 82-8-S25, 82-9-S25, 82-12-S25 82-13-S25, 82-14-S25, 83-1-S25 83-2-S25, 83-3-S25
MEMBERS OF THE STATE BAR OF ARIZONA,	
Respondents.	
	ORDER (Mandate)

Pursuant to the Opinion of this Court dated the 8th day of July, 1987,

IT IS ORDERED that STEPHEN M. ZANG be and hereby is suspended from the practice of law in the State of Arizona for the period of one year, effective the 8th day of July, 1987.

IT IS FURTHER ORDERED that C. PETER WHITMER be and hereby is suspended from the practice of law in the State of Arizona for the period of thirty days, effective the 17th day of September, 1987.

IT IS FURTHER ORDERED that pursuant to former Rule 37(h), Rules of the Supreme Court of Arizona, STEPHEN M. ZANG and C. PETER WHITMER shall notify all of their clients, within ten (10) days from the date hereof, of their inability to continue to represent them and that they should promptly retain new counsel, and shall promptly inform this Court of their compliance with this Order as provided by former Rule 37(h)4, Rules of the Supreme Court of Arizona.

IT IS FURTHER ORDERERED that restitution shall be paid to the following parties, with interest at the rate of ten percent per annum from the date improper payment was first received:

1. Rebecca Drummond (in the amount of $363.00, to be paid by Respondents Stephen M. Zang and C. Peter Whitmer);

2. State Farm Insurance Company (in the amount of $1,295.05, to be paid by Respondent Stephen M.. Zang only).

IT IS FURTHER ORDERED that pursuant to former Rule 37(g), Rules of the Supreme Court of Arizona, STEPHEN M. ZANG be and hereby is assessed the costs incurred by the State Bar of Arizona in the amount of $15,441.06, to be paid to the State Bar of Arizona prior to reinstatement as a member in good standing of the State Bar of Arizona.

IT IS FURTHER ORDERED that pursuant to former Rule 37(g), Rules of the Supreme Court of Arizona, C. PETER WHITMER be and hereby is assessed the costs incurred by the State Bar of Arizona in the amount of $11,166.97, to be paid to the State Bar of Arizona prior to reinstatement as a member in good standing of the State Bar of Arizona.

DATED this 17th day of September, 1987.

/s/ FRANK X. GORDON, JR., Chief Justice
FRANK X. GORDON, JR., Chief Justice

No. 87-1114

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1987

C. PETER WHITMER,

Petitioner,

vs.

THE STATE BAR OF ARIZONA,

Respondent.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

Edwin F. Hendricks
Attorney of Record

David G. Campbell
MEYER, HENDRICKS, VICTOR
OSBORN & MALEDON, P.A.
Suite 4000
2700 North Third Street
Phoenix, Arizona 85004
(602) 263-8700

February 2, 1988

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STATEMENT OF THE CASE

This case began in 1981 when several former employees of the petitioner's law firm complained to the State Bar of Arizona that the petitioner and his partner routinely engaged in various unethical practices. During 1981 the State Bar also began receiving complaints from lawyers and citizens about petitioner's advertisements. Special Administrative Committee S-25 (the "Committee") was appointed in 1982 to consider these complaints.

Under the rules of the Arizona Supreme Court then in effect, each disciplinary committee was authorized to appoint one or more members of the Arizona Bar to serve as bar counsel. The function of bar counsel was two-fold: to assist the disciplinary committee in its investigation of charges, and to present evidence to the committee at the formal disciplinary hearing. *See* Petition Appendix F, at 15.

The Committee appointed four Arizona attorneys to act as bar counsel in this case. These attorneys assisted the Committee in its investigation of petitioner's conduct, reporting the results of their investigation in three meetings held with the Committee during October and November of 1982. On December 11, 1982, having found probable cause to believe that petitioner had committed ethical violations, the Committee issued a ten-count complaint against the petitioner and his partner. Petition Appendix A, at 3. The issuance of the complaint and the investigation that preceded it complied in all respects with the governing rules of the Arizona Supreme Court. *See* Petition Appendix F.

The petitioner responded to the complaint by filing various motions that were not finally resolved until the

Arizona Supreme Court denied petitioner's request for interim relief in June of 1983. During the six-month hiatus between issuance of the complaint and final resolution of petitioner's motions, bar counsel had continued their investigation of charges against the petitioner, as permitted by the Arizona rules. Thus, when petitioner's motions were finally denied and the Committee was ready to resume the proceedings, bar counsel had six months of additional investigative findings to report.

A one-hour meeting was held for this purpose on July 5, 1983. Bar counsel reported the results of their investigation, recommended that several charges against the petitioner be dropped, and suggested that one charge be added to the complaint. Petition Appendix A, at 3–4. The Committee received bar counsel's report but did not discuss it in bar counsel's presence. There was no discussion of the weight or sufficiency of the evidence against petitioner, nor of how the Committee should respond to the investigative findings. After meeting privately, the Committee issued a first amended complaint. *Id.*

No further investigative contacts occurred between bar counsel and the Committee. During the next six months the parties engaged in vigorous discovery, including numerous depositions and the production of thousands of documents. Petitioner also filed several additional motions.

The formal hearing before the Committee began on January 23, 1984, more than six months after the July 5 meeting between the Committee and bar counsel. Petitioner was represented throughout the hearing by two attorneys. The hearing lasted more than nine days and

produced more than 2,000 pages of transcript. The Committee, which had no power to discipline the petitioner but could only recommend factual findings and appropriate discipline to the Arizona Supreme Court, deliberated for more than six months before finding that petitioner had committed several ethical violations. The Committee recommended that petitioner be suspended from practicing law for 180 days. Petition Appendix C.

The petitioner appealed this recommendation to the State Bar Disciplinary Commission (the "Commission"), a nine-member panel consisting of six lawyers and three non-lawyers. Like the Committee, the Commission could only recommend factual findings and appropriate discipline to the Arizona Supreme Court. The Commission heard arguments on May 11, 1985. Petitioner was again represented by two attorneys. Petitioner also made a statement to the Commission and answered questions.

The Commission issued its recommendation on February 4, 1986. The recommendation disagreed with the Committee on two charges, suggested that those charges be dismissed, but otherwise endorsed the Committee's proposed factual findings. The Commission recommended that the petitioner be suspended from practicing law for 90 days. Petition Appendix B.

The petitioner appealed to the Arizona Supreme Court, arguing, among other things, that the July 5, 1983 meeting between bar counsel and the Committee denied him due process of law. Although the petitioner now alleges that "numerous" *ex parte* contacts occurred between the Committee and bar counsel, *see* Petition at 8, only one such meeting was challenged before the Ari-

zona Supreme Court.[1] In a highly unusual development, the Arizona Supreme Court adjourned its proceeding for 45 days to allow the petitioner to conduct a thorough investigation and discovery of all aspects of the July 5 meeting. The petitioner served detailed interrogatories on all four bar counsel, all three members of the Committee, and the State Bar of Arizona. These interrogatories were answered in full. Having previously deposed one bar counsel with respect to the July 5 meeting, petitioner elected to take no further depositions. When the petitioner filed a supplemental brief at the close of this 45-day period, he was unable to identify any evidence of bias or prejudice on the part of the Committee or bar counsel. Petition Appendix A, at 2–9, 37 n.6.

The Arizona Supreme Court rejected petitioner's due process argument, finding as a matter of fact that the disciplinary proceedings were not biased or unfair. The court, which acted as a *de novo* finder of fact under the applicable rules, also found that petitioner had engaged in false and misleading advertising. Petitioner was suspended from the practice of law for 30 days, a suspension he has now completed. *Id.* On January 5, 1988, petitioner was reinstated as an active member of the Arizona Bar.

The rules governing bar disciplinary proceedings have now been changed by the Arizona Supreme Court.

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[1] As noted above, three additional meetings were held *before* the formal complaint was issued against petitioner in December of 1982. The petitioner did not challenge these meetings in his arguments to the Arizona Supreme Court, *see* Appendix at 3–4, presumably because they are akin to the *ex parte*, probable-cause hearings that occur between judges and prosecutors whenever arrest or search warrants are issued. *See Withrow v. Larkin*, 421 U.S. 35, 56 (1975).

The changes did not result from this case; they were made before the petitioner's claim reached the Arizona Supreme Court. Under the new rules, the investigative portion of disciplinary proceedings is separated from the adjudicatory phase, with bar counsel participating only in the latter. Thus, under procedures now in effect in Arizona, bar counsel no longer report their investigative findings to disciplinary committees. *See* Petition Appendix A, at 37 n.1.

REASONS FOR DENYING THE WRIT

This case is fact specific. The petitioner asks the Court to review a unique set of facts and declare them a denial of due process of law. The facts cannot recur in Arizona, and the petitioner has identified no other state which follows the abandoned Arizona system. No conflict among state or lower federal courts is suggested. No unique constitutional principles have been established by the decisions below. No additional guidance is needed in this due process area, for it is one in which the Court has already spoken. *See Withrow v. Larkin*, 421 U.S. 35 (1975).

After reviewing all of petitioner's discovery regarding the July 5 meeting and more than 2,000 pages of transcript, the Arizona Supreme Court found no evidence of bias or unfairness. The court's decision concerned due process questions to be sure, but it was based entirely on the unique facts of this case, as the following excerpt from the court's opinion demonstrates:

> The July 5 meeting concerned probable cause and amendments to the complaint, not the merits of the charges. Furthermore, the July 5 meeting occurred more than six months before the

> disciplinary hearing began. The broad discovery we allowed [petitioner] to conduct into the nature and content of the July 5 meeting uncovered no hint of unfairness or bias. *On these facts*, the July 5 meeting is indistinguishable from the ex parte investigations upheld in *Davis* and *Withrow*. We are unwilling to hold that four years of discovery, hearings, and appellate review, must be disregarded on the basis of an innocuous one-hour meeting.

Petition Appendix A, at 7–8 (emphasis added).

Straining for a question worthy of review, the petitioner contends that judges should not enjoy a relationship of trust and confidence with the prosecutors that appear before them. But the Arizona Supreme Court did not disagree with this proposition. The court instead searched the record for evidence of such a relationship in this case, and found none:

> [Petitioner's] assertion that bar counsel enjoyed an improper relationship of trust and confidence with the Committee is unsupported by the record. Neither [petitioner's] discovery nor our search of the hearing record revealed any evidence of bias or of a confidential or favored relationship between the Committee and bar counsel. On the contrary, the record reveals a consistent effort by the Committee to be fair and impartial.

Id. at 8.[2]

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[2] Because the Arizona court found as a matter of fact that no confidential, attorney-client relationship existed here, petitioner must argue that the mere assertion of the attorney-client privilege at the Committee level denied him due process of law. But the

Factual conclusions, not broad legal principles, formed the basis for the decision below. Those factual conclusions do not warrant review by writ of certiorari. Nor do they conflict with this Court's requirement in *Withrow* that parties attacking the fairness of a judicial or quasi-judicial proceeding produce some evidence of actual bias. *Withrow v. Larkin, supra,* 421 U.S. at 55. *See also Smith v. Phillips,* 455 U.S. 209, 216–217 (1982). The Arizona Supreme Court found that petitioner had produced no such evidence. *See* Petition Appendix A at 2–9. This case thus falls squarely within the "presumption of honesty and integrity" on the part of state adjudicators that this Court recognized in *Withrow*. 421 U.S. at 47. "Without a showing to the contrary, we assume that Committee members are 'capable of judging a particular controversy fairly on the basis of its own circumstances.'" *Id.* at 55, *quoting United States v. Morgan,* 313 U.S. 409, 412 (1941).

Nor should the Court grant review because the petitioner has alleged a conflict with *Ward v. Village of Monroeville,* 409 U.S. 57 (1972). The Arizona Supreme Court did indeed state that if a due process violation had occurred at the Committee level it was cured by the impartial, *de novo* hearing at both the Commission and Supreme Court levels. But this conclusion was set forth as an

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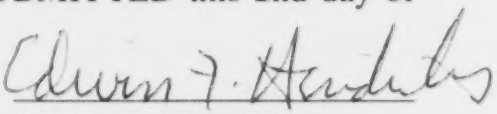
Arizona Supreme Court held the privilege had been asserted improperly and allowed the petitioner to conduct full and thorough discovery of all contacts between the Committee and bar counsel. Petitioner is therefore reduced to arguing that due process is denied by the mere assertion of the privilege, even though the assertion was later held to be incorrect, full discovery was allowed, no confidential relationship actually existed, and no evidence of bias was discovered. An argument so closely tied to the narrow facts of this case does not warrant review by the Court.

alternative holding only. *See* Petition Appendix at 8. The Arizona court's primary reason for denying petitioner's claim was his failure to present evidence of even a "hint of unfairness or bias." *Id.* at 7. Thus, even if this Court were to decide that the alternative holding was wrong, the decision below would still stand on the Arizona Supreme Court's independent factual finding that no bias or unfairness infected the proceedings below. Moreover, whether the rationale of *Ward* would apply to the unique facts of this case is not a question of broad national importance worthy of this Court's attention.

The petition should be denied.

RESPECTFULLY SUBMITTED this 2nd day of February, 1988.



Edwin F. Hendricks
Counsel of Record

David G. Campbell
MEYER, HENDRICKS, VICTOR,
OSBORN & MALEDON, P.A.
2700 North Third Street
Suite 4000
Phoenix, Arizona 85004
(602) 263-8700